

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

-----: :
SONY MUSIC ENTERTAINMENT, et al., :
Plaintiffs, :
-vs- : Case No. 1:18-cv-950
COX COMMUNICATIONS, INC., et al., :
Defendants. :
-----: :

VOLUME 2 (P.M. Portion)

TRIAL TRANSCRIPT

December 3, 2019

Before: Liam O'Grady, USDC Judge

And a Jury

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1 A F T E R N O O N S E S S I O N

2 NOTE: The afternoon portion of the proceedings on
3 December 3, 2019, begins in the absence of the jury as
4 follows:

5 JURY OUT

6 THE COURT: All right. Ready for the jury? Okay.

7 MR. OPPENHEIM: Yes.

8 THE COURT: All right. One of the jurors indicated
9 they had an important event on Thursday and they needed to
02:07:45 10 leave closer to 5:00, so we're going to -- I've agreed to let
11 the jury go at 5:00 on Thursday evening, just for your
12 information. Okay?

13 MR. OPPENHEIM: Are you -- I'm sorry. Go ahead.

14 MR. ELKIN: Your Honor, I just wanted -- just because
15 this may happen quickly when Mr. Gould passes the witness, I
16 just wanted to remind the Court, as I mentioned a couple weeks
17 ago and as counsel knows, as of three days ago, I intend to go
18 beyond the scope of the cross to take Mr. Marks in support of
19 our case since he's here.

02:08:22 20 THE COURT: Right. And that's agreed to.

21 MR. OPPENHEIM: Understood.

22 THE COURT: Yep. All right.

23 MR. OPPENHEIM: Generally, is the Court going to try
24 to go to 5:30?

25 THE COURT: Tonight? Yeah, between 5:30 and 6:00.

1 If I can push the jury to 6:00, I go to 6:00, but we got a
2 little push-back last night.

3 MR. OPPENHEIM: A little?

4 THE COURT: Yeah. We'll see how that goes. But on
5 Thursday, there's an occasion that one of the jurors has that I
6 want to honor. Okay.

7 MR. BUCHANAN: Thank you.

8 THE COURT: They are giving us a bit of their time.

9 All right. So, Joe, let's get our jury, please.

10 NOTE: At this point, the jury returns to the
11 courtroom; whereupon, the case continues as follows:

12 JURY IN

13 THE COURT: All right. Please have a seat.

14 All right. Mr. Gould, please continue, sir.

15 MR. GOULD: Thank you, Your Honor.

16 STEVEN MARKS, PLAINTIFFS' WITNESS, PREVIOUSLY SWORN

17 DIRECT EXAMINATION (Cont'd.)

18 BY MR. GOULD:

19 Q. Mr. Marks, how was your lunch?

02:10:01 20 A. Good.

21 Q. Great. Welcome back.

22 A. Thank you.

23 Q. You were asked some questions earlier about lawsuits
24 against Napster and Grokster. Do you recall that?

25 A. Yes.

1 Q. What kind of lawsuit or legal claim was brought against
2 Napster?

3 A. Contributory and vicarious -- contributory infringement
4 and vicarious infringement liability.

5 Q. And what kind of lawsuit or legal claim was brought
6 against Grokster?

7 A. Principally, the same.

8 Q. And what were those?

9 A. Contributory infringement and vicarious infringement.

02:10:37 10 Q. You were also asked some questions about lawsuits against
11 end users. Do you recall that?

12 A. Yes.

13 Q. Did RIAA try to find out some of the Cox subscribers?

14 A. Correct.

15 Q. How did Cox respond?

16 A. They --

17 MR. ELKIN: Objection.

18 THE COURT: Yeah, it was already asked and answered.
19 You're retreading old ground now. Let's move forward.

02:11:05 20 MR. GOULD: Understood.

21 THE COURT: Okay. Thank you.

22 BY MR. GOULD:

23 Q. Has the RIAA ever sued BitTorrent?

24 A. No. It's not really possible to sue BitTorrent because
25 BitTorrent is a protocol, not an actual company or service.

1 Q. What about eDonkey?

2 A. Same thing.

3 Q. What about Ares?

4 A. Same.

5 Q. And Gnutella?

6 A. The same.

7 Q. Has the record industry ever sued ISPs, other ISPs for
8 contributory infringement, copyright infringement?

9 A. Yes. There are a number of additional suits against other
02:11:45 10 ISPs that I think are either currently pending. I'm not in the
11 role anymore, so I don't know the exact stage, but they include
12 Grande, Charter, RCN, Bright House, and maybe one or two
13 others.

14 Q. I want to turn to the period starting around 2008, when
15 you said the end user lawsuits ended. Did the RIAA shift its
16 approach to battling peer-to-peer infringement at that time?

17 A. Yeah. As I explained earlier, suing individuals was not
18 something that could stop all of the infringement because there
19 were just too many people engaged in it, and so as part of, you
02:12:36 20 know, our effort to deal with the problem, we decided to create
21 what we called a notice program where we would send notices to
22 ISPs with information about specific instances of infringement
23 by subscribers on their networks.

24 Q. Why did you take that approach?

25 A. Well, as -- one is that the ISPs have responsibility for

1 addressing infringement on their networks, and they knew that
2 there were a lot of infringement. Everybody by this time knew
3 that P2P in particular was devastating our industry and
4 beginning to impact a lot of other industries, and so we, we
5 wanted to, you know, work mostly in partnership with them in
6 terms of, you know, giving them enough information so that they
7 can then act on that information that we were giving them by
8 taking appropriate action with respect to the subscribers, and
9 there were laws in place to, you know, deal with this and
02:13:44 10 address it.

11 Q. What kind of laws?

12 A. Copyright law, and in particular the Digital Millennium
13 Copyright Act, which was a law that was passed in 1998 and
14 contained provisions about how a notice program like this would
15 work, where a copyright owner could send notice to an ISP and
16 that ISP would have an obligation to address repeat
17 infringement if it wanted to take advantage of what was called
18 a safe harbor in that, in that law.

19 Q. Do you have an understanding of what the safe harbor is?

02:14:25 20 MR. ELKIN: Objection.

21 THE COURT: Yeah, sustained. Let's not go through
22 the law with this witness.

23 MR. GOULD: Your Honor, it's foundational for why
24 the -- if I could approach?

25 THE COURT: Yeah. Come to the sidebar.

1 NOTE: A sidebar discussion is had between the Court
2 and counsel out of the hearing of the jury as follows:

3 AT SIDEBAR

4 THE COURT: Yes, sir.

5 MR. GOULD: The intent is not to have Mr. Marks
6 testify about what the law is or means but his understanding of
7 it and why that was a foundational component of why the RIAA
8 got the notice program off the ground. The DMCA and safe
9 harbor was the critical element for why they took the approach
02:15:19 10 they did.

11 THE COURT: I think that's legitimate. I think why
12 they started the notice program and why they believed it was
13 the way to move forward with the ISPs, I think, is relevant.
14 He's not commenting on the law itself but why he did what he
15 did in response to the, what he understood the law to be.

16 MR. GOULD: Just to clarify so I understand the
17 parameters --

18 THE COURT: Yeah.

19 MR. GOULD: -- I do intend to ask him what his
02:15:43 20 understanding was of the law and why that was a motivating
21 factor, and he would say if they had a repeat infringer policy
22 that terminated, they would be insulated from liability. We
23 thought they would do that.

24 MR. ELKIN: The one thing I would say, Your Honor, is
25 that I think that the last question sort of does hinge on

1 giving the jury the instructions that Your Honor is going to
2 give at the end of the case, and I -- you know, at some point,
3 it does become blurred in terms of what his -- it's setting
4 forward his understanding of the law and the motivations and
5 basically starting to tell the jury, you know, what the law is
6 all about. That's a concern I have.

7 THE COURT: Yeah. I'm going to allow it. He's in a
8 position that he was in with RIAA, and I think he's qualified
9 to at least give his opinion and -- but the focus should be on
02:16:39 10 what he did in response to what he understood the law to
11 permit.

12 MR. GOULD: Okay.

13 THE COURT: But I'll allow you to ask those
14 questions.

15 Your exception is noted.

16 MR. ELKIN: Thank you, Your Honor.

17 NOTE: The sidebar discussion is concluded;
18 whereupon, the case continues before the jury as follows:

19 BEFORE THE JURY

02:17:19 20 BY MR. GOULD:

21 Q. Mr. Marks, do you have an understanding of what the safe
22 harbor is under the DMCA?

23 A. Yes. It's -- safe harbor is a provision that gives --
24 it's a way for a party, in this case the ISP, to avoid being
25 sued, avoid liability if they take certain actions.

1 Q. Was that part of your thinking or consideration -- I'll
2 ask a different question.

3 How did that factor into RIAA's thinking in starting
4 a notice program?

5 A. Prominently, because the idea was that we would -- they
6 had an obligation if they wanted this immunity or wanted to
7 avoid being sued to implement a policy that was reasonable to
8 address repeat infringers through termination in appropriate
9 circumstances, and so it was kind of set up in the law for us
02:18:19 10 to be able to send notices that specified what those notices
11 had to contain. It was a framework for what we were doing.

12 And we expected, just to finish the thought, I guess
13 we expected that Cox and other ISPs would want to avoid
14 liability and, therefore, address the infringement that was
15 occurring among their subscribers on their networks.

16 Q. Did the RIAA use a vendor to send notices?

17 A. Yes.

18 Q. And who was that?

19 A. The vendor's name was MarkMonitor.

02:19:03 20 Q. What did MarkMonitor do in the notice program?

21 A. MarkMonitor served kind of an investigatory role. They
22 basically went onto the P2P networks, found specific instances
23 of infringement, documented those, made sure that the files
24 that were said to be distributed were actually the files that
25 our companies owned, and then that information could be put

1 into a notice that we could send to the ISP.

2 Q. I want to back up just two questions just to clarify what
3 you meant by "immunity" before.

4 A. Yeah. Immunity is just, sorry, a way of saying no
5 liability or not being sued.

6 Q. Is that -- you're referring to the safe harbor?

7 A. Yes.

8 Q. Why did RIAA select MarkMonitor?

9 A. MarkMonitor was known to be a very sophisticated and
02:20:03 10 reputable vendor for these kinds of services. There weren't a
11 lot of these services that existed, and MarkMonitor had the
12 best reputation as far as we knew and could tell.

13 Q. When did RIAA start sending infringement notices to Cox?

14 A. 2008, I believe.

15 Q. Were there any discussions with Cox about getting that off
16 the ground?

17 A. Yes. We wanted to make sure, for example, that the
18 notices we were sending were going to be accepted, because
19 they -- you know, just to make sure that they were in the right
02:20:37 20 form and we were sending them according to a certain file
21 format and things, and we wanted that to go smoothly.

22 Q. Were you able to figure that out?

23 MR. ELKIN: Objection.

24 THE COURT: Well, it's a pretty broad, general
25 question. Why don't you ask a more specific question, please.

1 BY MR. GOULD:

2 Q. Did you come to a point where you were able to send
3 notices to Cox?

4 A. Eventually, yes.

5 Q. Did you understand Cox would accept the format of those
6 notices?

7 A. Yes, yes.

8 Q. Do you recall what information was included in the
9 notices?

02:21:15 10 A. Well, the notice identified -- it had the IP address,
11 which, as I was saying earlier, is the way to identify the
12 computer, the device being used. It had the name of the
13 recording, for example, that was one of our members' recording
14 that was being infringed.

15 It, it had, you know, a certain format. We were
16 required, for example, to state everything under penalty of
17 perjury, and so all of that information was there. I mean, in
18 short, it was all the information that Cox needed to be able to
19 address the infringement that we were giving them notice about.

02:21:59 20 MR. GOULD: Your Honor, if I may approach to hand the
21 witness a binder?

22 THE COURT: No, Mr. Ruelas will be happy to do that
23 for you.

24 MR. GOULD: Thank you, sir.

25 BY MR. GOULD:

1 Q. Mr. Marks, if you could turn to tab 5 in your binder,
2 please. Do you recognize this document?

3 A. Yes.

4 THE COURT: Is it one of plaintiff's exhibits
5 separately?

6 MR. GOULD: Yes. Thank you, Your Honor. For the
7 record, this -- I'm directing the witness to PX 537.

8 THE WITNESS: Yes, I recognize it.

9 MR. GOULD: I would move to admit 537, plaintiff's.

02:22:39 10 MR. ELKIN: No objection.

11 THE COURT: It's received.

12 MR. GOULD: Could we please publish 537 for the
13 Court?

14 BY MR. GOULD:

15 Q. Mr. Marks, what did you say this exhibit is?

16 A. This is a notice that Jeremy Landis in the RIAA antipiracy
17 department sent to Cox identifying a specific act of
18 infringement.

19 Q. And I just want to take a look visually at an overview
02:23:12 20 here first. What's the format of this?

21 A. The format is -- I'm sorry?

22 Q. It looks like an e-mail.

23 A. Oh, yeah. Sorry. Yeah, it's an e-mail that was sent from
24 a dedicated antipiracy account at RIAA to the dedicated account
25 that Cox had. This would have been part of the discussion that

1 you referred to earlier between RIAA and Fox (sic) to let them
2 know, hey, these were coming, here's who it's coming from, and
3 who to send it to.

4 MR. GOULD: Mr. Duval, if you could zoom in on the
5 top half, please? Above that. The To and From. Further,
6 please. A little bit further. There you go.

7 BY MR. GOULD:

8 Q. Do you see there's a To address?

9 A. Yes.

02:24:09 10 Q. Who is the e-mail addressed to?

11 A. That's the designated Cox e-mail address. It's
12 abuse@cox.net.

13 Q. Thank you.

14 And if we could scroll down to the very bottom of the
15 PX 37? Actually above that. Right there.

16 And could you tell us, sir, whose signature is on
17 this notice?

18 A. Yeah. Jeremy Landis, who works in the RIAA antipiracy
19 department.

02:24:36 20 MR. GOULD: Now, if we could call up the first two
21 paragraphs of text, please?

22 BY MR. GOULD:

23 Q. Mr. Marks, could you read those paragraphs, please?

24 A. I am contacting you on behalf of the Recording Industry
25 Association of America -- the trade association whose member

1 music companies create, manufacture, and distribute
2 approximately 85% of all legitimate music sold in the United
3 States.

4 If you are an internet service provider (ISP), you
5 have received this letter because we have identified a user on
6 your network reproducing or distributing an unauthorized copy
7 of a copyrighted sound recording. This letter constitutes
8 notice to you that this user may be liable for infringing
9 activity occurring on your network.

02:25:34 10 Q. What was the purpose of this -- these paragraphs?

11 A. The purpose of the first one is to identify who RIAA is
12 and who we're sending this on behalf of, which, you know, the
13 RIAA members represent approximately 85 percent of the music
14 that's sold in the U.S., and then the second paragraph is to
15 make clear that we were providing Cox notice of infringement
16 that was occurring on their network by one of their subscribers
17 of a, a specific instance of that infringement, as is detailed
18 later.

19 MR. GOULD: If we could scroll down, Mr. Duval, to
02:26:23 20 the paragraph beginning: We have attached below. If you could
21 blow that up, please.

22 BY MR. GOULD:

23 Q. I apologize for asking, it's a bit of a long paragraph,
24 could you read up to the last sentence, please?

25 A. Sure. We have attached below the details of the illegal

1 file-sharing, including the time, date, and a sampling of the
2 music shared. We assert that the information in this notice is
3 accurate, based upon the data available to us. We have a good
4 faith belief that this activity is not authorized by the
5 copyright owner, its agent, or the law. Under penalty of
6 perjury, we submit that the RIAA is authorized to act on behalf
7 of its member companies in matters involving the infringement
8 of their sound recordings, including enforcing their copyrights
9 and common law rights on the internet.

02:27:30 10 Q. What does "shared" mean in the first sentence of that
11 paragraph?

12 A. P2P networks were -- sometimes the activity was
13 colloquially referred to as file sharing, which was misleading
14 because it made it sound as though I'm sharing, that's fine,
15 there's nothing wrong with sharing, when, in fact, the sharing
16 was actually an illegal distribution of, of the works and
17 therefore copyright infringement.

18 Q. The categories of information in this paragraph, why did
19 the RIAA include that information in the notice?

02:28:11 20 A. The information in this paragraph?

21 Q. Yeah.

22 A. We were -- first of all, it complied with the law and what
23 was required under the DMCA for us to send it, and to emphasize
24 that, you know, we had information that was very specific: the
25 time, the date. We had verified that the, that the music

1 listed had actually been shared, and that, as I was saying
2 before, there -- we had to under penalty of perjury -- this was
3 not a letter that you could just send off with a thought about
4 it. You had to be pretty certain that -- very certain that the
5 information in it was accurate and true.

6 Q. Now, between the highlights on that second line, there's a
7 phrase, "sampling of the music shared." What does that mean
8 here, "a sampling of the music shared"?

9 A. So the way that MarkMonitor determined whether the music
02:29:16 10 file actually contained the music that belonged to one of our
11 members was that they would first make a download of the whole
12 file the first time they found it, and then they would check
13 that against a database, which had something called a hash
14 value, which is kind of a way of -- it's kind of like the DNA
15 of the file. It's the -- it's a way of identifying the file
16 precisely, knowing that that's, that's actually that file.

17 And so in, in the future, after you'd looked at it
18 once and verified it, you could then match this file DNA, or
19 hash, to verify that another person was using that same file.

02:30:06 20 Q. And the word "sampling," what does that mean?

21 A. That, that they had, they had listened to a part of it or
22 there was a part of it but not the whole thing.

23 Oh, the sampling of the music shared, I'm sorry.
24 That would refer -- you know, later on refers to the fact that
25 in any -- the way peer-to-peer worked was that files could

1 contain more than one recording. We were only in the notice
2 listing the one recording, but there could -- there were
3 additional ones in there as well. So we were, we were saying
4 the details here are for a sampling of the music shared,
5 meaning that one that we were, you know, featuring in the, in
6 the details below. Sorry.

7 MR. GOULD: If we could scroll down to the portion
8 that begins with "list of infringing content." And blow up
9 that, please, sir.

10 BY MR. GOULD:

11 Q. What does this section of the notice show?

12 A. So this, this identifies the work that was being infringed
13 by name, artist, when it was found, how big the file was,
14 importantly what the IP address was, and what the network and
15 protocol was. So BitTorrent, as we were discussing earlier,
16 was the P2P protocol that was being used for this particular
17 one.

18 Q. Do you know how many infringement notices RIAA sent to
19 Cox?

02:32:04 20 A. I don't know specifically, but it was a lot.

21 Q. What do you mean by "a lot"?

22 A. I think millions.

23 Q. Are you sure about that?

24 MR. ELKIN: Objection.

25 THE COURT: Don't, don't guess.

1 THE WITNESS: Yeah, sorry. I don't, I don't
2 remember.

3 BY MR. GOULD:

4 Q. Okay. You said it was a lot in your mind.

5 Was RIAA --

6 THE COURT: We don't testify. We testify when we're
7 under oath on the witness stand, okay?

8 MR. GOULD: Thank you, Your Honor, for the reminder.

9 BY MR. GOULD:

02:32:39 10 Q. Did the RIAA send notices to Cox for all the infringement
11 it detected?

12 A. No.

13 Q. Why not?

14 A. The --

15 MR. ELKIN: Objection. Lack of foundation.

16 THE COURT: All right. Yeah, lay a foundation.

17 MR. GOULD: I'll move ahead and come back to it.

18 THE COURT: Okay.

19 BY MR. GOULD:

02:33:02 20 Q. Do you recall discussions with Cox about the number of
21 notices RIAA would send?

22 A. Yes.

23 Q. What, what are those discussions?

24 A. I mean, the main thing I remember from that is that Cox
25 was really the first ISP to tell us: Hey, we're not going to

1 accept more than this many notices; in other words, they put a
2 cap. So after we had gone through the discussion of the form
3 of the notice and that we were going to be sending them, Cox
4 told us: And we'll only accept up to 200 notices per day.

5 Q. And that was for who?

6 A. That was 200 notices for -- I mean, we were representing
7 85 percent of the entire recording music industry, so the, the
8 hundreds and hundreds of record labels that existed and owned
9 all that music combined would get 200 notices.

02:34:08 10 Q. What was RIAA's perspective on that?

11 A. We were surprised by it and felt it was not really in the
12 spirit of trying to address what was a very serious problem for
13 our industry. I mean, there's just no way that you could
14 counter all of the infringement by only sending 200 notices.

15 Q. So what did you do?

16 A. We asked if they would take more, and unfortunately, we
17 were shut down. And then we asked again later, and we got a
18 little bit of a bump from 200 to 400, and then later on again
19 from 400 to 600. So -- but over many years.

02:34:59 20 Q. I direct you, Mr. Marks, to tab 2 in your binder. It's
21 PX 234.

22 A. Yes.

23 Q. Do you recognize this document?

24 A. Yes.

25 MR. GOULD: I move to admit PX 234.

1 THE COURT: Any objection?

2 MR. ELKIN: No objection, Your Honor.

3 THE COURT: It's received.

4 BY MR. GOULD:

5 Q. Mr. Marks, what is Exhibit 234?

6 A. It's an e-mail exchange between Victoria Sheckler, who was
7 a lawyer in my department, and Randy Cadenhead of Cox, and --
8 yeah.

9 Q. I draw your attention to the middle e-mail on the first
02:35:53 10 page from July 9, 2009.

11 A. Yes.

12 Q. Who is listed as -- are you among the recipients of this
13 e-mail?

14 A. Yes. I was copied along with three of my colleagues at
15 RIAA.

16 Q. And could you read this e-mail for the jury, please?

17 A. Yes.

18 Thanks again. We wanted to check in with you about
19 the possibility of raising the number of daily notices we send
02:36:23 20 to you to 800 or 1,000 per day. Please let us know if this is
21 acceptable. Also, we recently noticed that in the month of
22 June, we sent ten notices each to two different IP addresses --
23 I don't know if this is the same two users or multiple users.
24 Would it be possible to find out? If yes, we'll send you the
25 data on these 20 notices. I look forward to hearing from you.

1 Regards, Vicky Sheckler.

2 Q. Do you recall receiving a response from Cox?

3 A. Yes. Mr. Cadenhead sent a response and said that they
4 were, as the e-mail says, currently at the maximum number that
5 they could process measured against the staff we have to
6 process calls from customers.

7 Q. And the next sentence?

8 A. You might want to consider not sending us multiple notices
9 for the same IP on the same day as one way to make better use
02:37:29 10 of the resources we have to apply.

11 Q. And the next sentence?

12 A. In terms of the two you mentioned, we can't give you
13 information about them.

14 Q. What did you think of this response?

15 A. We were not happy about it. This was part of what I
16 referred to earlier about the lack of cooperation that we had
17 with Cox on these matters. You know, Vicky had sent notes
18 asking what we thought was a reasonable request, and
19 Randy Cadenhead sent this note back, I don't know, three hours
02:38:06 20 later, basically saying no. So it didn't strike us that very
21 much discussion or internal consideration was done at Cox
22 before he just kind of, you know, replied, saying, no, we won't
23 take any more.

24 And then the sentence about you might want to
25 consider not sending us multiple notices for the same IP on the

1 same day was kind of like saying don't send us information
2 where you -- where there's evidence of repeat infringement,
3 which is exactly the kind of behavior that is supposed to be
4 addressed under the DMCA safe harbor.

5 Q. I want to -- you can pull that one down, please, sir.

6 If you could direct your attention to tab 3 in your
7 binder, PX 257. I'll ask if you recognize it.

8 A. Yes.

9 Q. Do you see you're a recipient on the initial e-mail?

02:39:10 10 A. Yes. Yeah, the initial e-mail is from Ms. Sheckler, and
11 I'm again copied with one of my colleagues at RIAA and two
12 colleagues at -- or two, two people we worked with at the
13 Motion Picture Association.

14 MR. GOULD: I move to admit PX 257.

15 THE COURT: Any objection?

16 MR. ELKIN: No objection.

17 THE COURT: Received.

18 MR. GOULD: If you could call up the bottom e-mail,
19 please, Mr. Duval.

02:39:43 20 BY MR. GOULD:

21 Q. Do you see the date of this e-mail, sir?

22 A. April 26, 2010.

23 Q. And again, you're a recipient on the copy line?

24 A. Yes.

25 Q. Could you read the first sentence, please?

1 A. Randy, per our discussion, attached please find the data
2 on "infringements found" (labeled "1"), and "notices sent"
3 (labeled "2") for Cox subscribers that was used in the
4 analysis, along with the annotated version of the code used for
5 the model and an associated flow diagram.

6 Q. Are you familiar with the information she referenced that
7 she attached?

8 A. Yes.

9 Q. And what is that?

02:40:39 10 A. She -- Vicky was sending a list of, hey, here are all the
11 infringements we found, which were a lot, and here are the
12 notices we've sent, which were just a tiny -- a small fraction
13 of that amount. So it was meant to demonstrate with the, the
14 volume that we're capped at, we're not really able to
15 meaningfully address the infringement through these notices,
16 because you're not accepting any, any notices above the 200 or
17 the 400 at the time, and there's all this infringement going on
18 on your network. We really need to be able to send you more
19 notices so that you can effectively address it.

02:41:27 20 Q. Did you prepare a slide to assist the jury in
21 understanding the information in this spreadsheet?

22 A. Yes.

23 MR. GOULD: Permission to publish, Your Honor?

24 THE COURT: Any objection?

25 MR. ELKIN: No objection.

1 THE COURT: It's received. Go ahead.

2 MR. GOULD: We can call this Plaintiff's
3 Demonstrative Exhibit -- what are we up to? Why don't we say 5
4 to be safe.

5 THE COURT: Okay.

6 MR. GOULD: We'll try to backfill when we figure it
7 out.

8 THE COURT: Okay.

9 BY MR. GOULD:

02:42:00 10 Q. And, Mr. Marks, can you explain what this -- what you've
11 summarized in this slide?

12 A. Yeah. It's a pie chart showing the total number of
13 infringements that we found on February 23, 2010, which was,
14 you know, shortly before this e-mail, and how many of those --
15 so there were 4,051 total infringements that we found on that
16 day, and we had sent notices to Cox totaling 445, so roughly,
17 you know, a little more than 10 percent, 11-12 percent of the
18 total.

19 So 3,606 infringements we were not able to send a
02:42:46 20 notice to Cox because they had instituted this unilateral cap.

21 Q. Was every day this big a difference?

22 A. Yes, pretty much. I mean, it may have varied from day to
23 day, but it was generally a small fraction of what the total
24 was.

25 Q. Some days more, some days less?

1 MR. ELKIN: Objection.

2 MR. GOULD: Withdrawn.

3 THE COURT: If he knows.

4 MR. GOULD: Yeah, withdrawn.

5 THE COURT: Ask your next question.

6 MR. GOULD: Turn to the next slide, please. Thank
7 you.

8 BY MR. GOULD:

9 Q. And what does the second slide show?

02:43:23 10 A. It's the same -- it's showing basically the same thing
11 except instead of looking just at the one day, it's looking at
12 a complete year. So we had found more than 366,000
13 infringements on the Cox network, and we were only able to send
14 84,000 notices during that year period. So, you know, it's
15 roughly -- well, it's less than a quarter, 20 to 22 percent or
16 23. I'm not sure of the exact amount, but, again, a small
17 fraction.

18 Q. Do you know if the RIAA always sent up to the full amount
19 of the cap?

02:44:07 20 MR. ELKIN: Objection. Foundation.

21 THE COURT: Yeah, lay a foundation.

22 BY MR. GOULD:

23 Q. You were involved to some degree with the RIAA notice
24 program?

25 A. Yes.

1 Q. And had some involvement in understanding the nature of
2 that program and the number of notices sent?

3 A. Yes.

4 Q. Did you have an understanding of -- do you know as you sit
5 here today whether Cox was sending the full amount under the
6 caps? I'm sorry, strike that.

7 Do you know as you sit here today if RIAA was sending
8 the full amount Cox permitted under the cap?

9 A. I think there were times during that -- the period over
02:44:54 10 those years that we were and some times where we were not.

11 Q. Do you know why?

12 A. Yeah. We, we had a mistake on our end. When Cox did
13 agree to go from 400 to 600, internally it was not communicated
14 to our vendor that it could be increased all the way up to that
15 level. I didn't know that at the time and found out about it
16 much later.

17 Q. I want to turn back to 234, please.

18 Excuse me, I apologize. I'd like to call up PX --
19 excuse me.

02:46:02 20 Mr. Marks, could you turn to tab 4 in your binder?

21 A. Sure.

22 Q. Do you recognize this PX 327?

23 A. Yes.

24 MR. GOULD: I move to admit PX 327.

25 THE COURT: Any objection?

1 MR. ELKIN: No objection.

2 THE COURT: Received.

3 BY MR. GOULD:

4 Q. And what is PX 327?

5 A. So it's a request some years later than the previous
6 e-mails we were looking at, about three years later, asking for
7 an increase from the 400 per day limit to something higher, and
8 it was, it was requested again directly from Ms. Sheckler on my
9 team to Mr. Cadenhead.

02:47:02 10 Q. And remind the jury, who's Ms. Sheckler?

11 A. She's -- her title is deputy general counsel at RIAA. So
12 she, she was on the legal team and reported directly to me.

13 MR. GOULD: And if you could scroll up to -- all
14 right. Pull up the bottom e-mail, please.

15 BY MR. GOULD:

16 Q. And what does Ms. Sheckler ask here?

17 A. She's asking for that increase from 400. So we'd like to
18 increase the number of P2P notices that we send to Cox. The
19 current limit is 400 per day, and we'd like to increase it.

02:48:03 20 MR. GOULD: And can we scroll up to Mr. Cadenhead's
21 response?

22 BY MR. GOULD:

23 Q. Could read that for the jury, please?

24 A. We have a fairly hard limit on the number of calls from
25 customers that our team can handle in a day, but within those

1 parameters, we would be happy to discuss the number of notices
2 that we accept from you. Can you give me some sense of what
3 you are thinking?

4 Q. And Ms. Sheckler replies?

5 A. She, she said: How about 500 or 600 per weekday?

6 Q. Was this before or after the pie charts we just looked at?

7 A. It was after.

8 MR. GOULD: And if you scroll up to Mr. Cadenhead's
9 response?

10 BY MR. GOULD:

11 Q. And could you read what he says?

12 A. I've checked with our technical team. We do want to be as
13 helpful as we can, but we have to be mindful of the call volume
14 that notices generate. They think that we can try accepting
15 600 per day, subject to unexpected call concerns that might
16 arise. Does that sound okay?

17 Q. And do you see how Ms. Sheckler responds?

18 A. Yes. She said: Thanks.

19 Q. Was this an agreement in your mind, sir?

02:49:34 20 MR. ELKIN: Objection.

21 THE COURT: Yeah. What's his understanding of this
22 negotiation? Sustained.

23 BY MR. GOULD:

24 Q. Mr. Marks, what was your understanding of this discussion?

25 A. Well, again, we're operating in a world where Cox was

1 giving us crumbs to address, you know, not to use the pie chart
2 again, but a lot of -- a big pie of infringement, and, you
3 know, we had made a request to bump that up modestly.

4 I mean, I've gotta say when we get this e-mail back
5 from Mr. Cadenhead saying we want to be helpful, but we have to
6 be mindful of call volume, so basically, this is a
7 multi-billion-dollar company with huge profits from -- and a
8 huge amount of infringement on its network, and they're
9 basically saying, well, we can try to go up to 600 if there
02:50:48 10 aren't too many phone calls that come in from customers,
11 because that might, you know, increase our costs.

12 I mean, I didn't know why they just couldn't, you
13 know, I mean, there are call centers, you could hire one or two
14 more people on a part-time basis. There are all kinds of ways
15 to address this, and in light of the amount of infringement
16 that was going on and the fact that, you know, Cox itself could
17 be sued if they didn't take appropriate action with respect to
18 that infringement, it just -- again, it just didn't seem like a
19 very cooperative way to work together.

02:51:19 20 Q. Do you have an under- -- did you understand whether this
21 was an agreement in your mind?

22 MR. ELKIN: Objection.

23 THE COURT: I think he's just explained what it was.
24 I'll sustain that.

25 MR. OPPENHEIM: Sustained or overruled?

1 THE COURT: I sustained it, yeah.

2 BY MR. GOULD:

3 Q. I want to turn to tab 1 in your binder, please. This is
4 PX 7.

5 A. Yes.

6 Q. Do you recognize this, Mr. Marks?

7 A. Yes.

8 MR. GOULD: I move to admit PX 7.

9 MR. ELKIN: No objection, Your Honor.

02:52:09 10 THE COURT: It's received.

11 MR. GOULD: You can publish, please.

12 BY MR. GOULD:

13 Q. Mr. Marks, could you identify the to and from on this
14 e-mail?

15 A. This was an automatic response from that abuse@cox.net
16 e-mail address, which is titled "Cox Customer Safety," and it
17 was sent to the RIAA antipiracy address.

18 Q. I want to call up a sentence in the second paragraph,
19 starting with: Cox Communications takes all reports of abuse
02:52:51 20 seriously.

21 A. Yes.

22 Q. Do you agree with that based on what you knew about the
23 Cox system?

24 A. Well, no. I mean, first of all, they were limiting our
25 ability to report complaints, knowing that there was a lot more

1 infringement on their network. I mean, that was clear.

2 And, second, given that we were seeing notices being
3 sent to the same IP address over and over, it wasn't clear to
4 us that they were really actually addressing it even for those
5 that they received it on, those subscribers that, you know,
6 were engaging in repeated acts of infringement.

7 Q. If we could look at the last sentence of the next
8 paragraph, starting with: Please.

9 Please be assured that if we find that a customer is
02:53:51 10 in violation of the above policies, we will take the necessary
11 action to stop the activity in question.

12 Did you form any views about that?

13 A. Yeah. It was not our understanding that they were really
14 taking action to stop the activity in question.

15 Q. I want to shift gears and talk about the Copyright Alert
16 System. Do you have some familiarity with that?

17 A. Yes.

18 Q. What's the basis for your familiarity?

19 A. I was directly involved in the discussions of that program
02:54:21 20 from the very beginning.

21 Q. And what is or what was the Copyright Alert System?

22 A. The Copyright Alert System was part of an agreement, a
23 voluntary agreement between the record -- recorded music
24 industry, the Motion Picture Industry on the one hand as
25 copyright owners, and five internet service providers, and the

1 purpose of it was to deter -- find a way to deter infringement
2 and try to direct consumers or subscribers to lawful
3 alternatives, in other words, to help promote or highlight
4 places where you could buy music legally.

5 Q. When was -- when did CAS start, C-A-S?

6 A. The -- well, the agreement was signed in July of 2011.

7 Q. And was there any lead-up to that?

8 A. There were discussions that took place over a number of
9 years before we got to that point.

02:55:29 10 Q. When did the program get off the ground, so to speak?

11 A. Well, there was a -- after the documents were signed,
12 there were additional things that needed to be done in order to
13 get it up and running. So it wasn't really fully up and
14 running until a couple years after that.

15 Q. What was the RIAA's involvement?

16 A. So, we were there as a representative of our member
17 companies and, you know, the recording industry generally, even
18 some of the independents who were not part of the discussion
19 were relying on us in this way to complete the agreement,
02:56:07 20 and -- yeah, I'm sorry, what -- just refresh me what the

21 question was because I lost --

22 Q. I think you answered it.

23 A. Okay. I just want to make sure I got all of it.

24 Q. Were you personally involved?

25 A. Yes, I was.

1 Q. In what manner?

2 A. I was at virtually every meeting about it, and I was
3 directly involved in the discussions and the negotiations that
4 occurred to get the agreement in place.

5 Q. What was the RIAA hoping to achieve with this program?

6 A. Well, we were hoping to find a meaningful way of
7 addressing the infringement that continued to occur, so, you
8 know, just stepping back, we had, you know, sued Napster,
9 Grokster, and other companies. We were trying to get those
02:56:58 10 shut down, but the activity was kind of morphing away from
11 companies that could be sued to using the, the underlying
12 protocol without -- you know, under a company umbrella, and so
13 there was still this pervasive infringement going on, and we
14 thought notice programs, in particular notice programs that had
15 some kind of consequence or teeth to them would help deter that
16 infringement and educate people in a way that got their
17 attention that what they were doing was, was illegal.

18 Q. What did you need the ISPs for?

19 A. Again, they, they had the information on who the
02:57:47 20 subscribers were. We could only identify the IP address, which
21 was the -- you know, the address for the device. They knew who
22 that device was connected to, you know, which subscriber of
23 theirs it was connected to. So we had no way of getting the
24 notice to the individual without the help of the internet
25 service providers.

1 Q. Any other reasons to work with the ISPs on this?

2 A. Well, you know, there was a broader purpose to it, which
3 is to say, you have to realize that all this happened very
4 fast, the piracy that occurred, and the music industry in
5 particular was the first one that was really affected by it.
6 When it started, the files for movies were still too big to
7 really distribute on these networks, although that changed, you
8 know, over time, and we were often really the only ones
9 speaking out about this and how it was affecting our business,
02:58:54 10 which, you know, we were -- that was part of what we did, but
11 by having the ISPs enter into an agreement with us where the
12 purpose of the agreement was to address this infringement was
13 extraordinarily meaningful to us, because it wasn't just that
14 they were going to implement what we agreed to, but they were
15 standing next to us basically shoulder to shoulder, validating
16 and saying yes, there's a lot of infringement happening, and it
17 needs to be addressed.

18 And, you know, that was something that they did not
19 only by signing the agreement, but that agreement included
02:59:40 20 creating an organization called the Center for Copyright
21 Information, CCI -- sorry for all the acronyms -- but -- and
22 that was an organization that was half content owners, so the
23 movie and music industry, and then half ISPs.

24 And the purpose of CCI was to put, put in place this
25 notice system that worked well, safeguarded, you know, consumer

1 rights, privacy issues, had appeals and things like that to
2 make sure it was fair, but it also, an important part of the --
3 of that organization's purpose was to create educational
4 programs and to generally be -- you know, there was an
5 executive director that was hired, somebody who was formerly
6 from a technology company, and she would, you know, go on
7 panels, develop talking papers, things that would help explain
8 what was going on and what the impact was and that there were
9 lawful alternatives to get this.

03:00:58 10 You know, we can do that, but when we're doing it,
11 it's kind of self-serving or could be viewed as self-serving
12 because it's our business that was being impacted. Having the
13 largest or some of the largest ISPs, some of the largest
14 companies in the entire country for that matter standing with
15 us and saying, hey, this is a problem, it needs to be
16 addressed, and we're going to address it in this way, was very,
17 very valuable.

18 Q. Was Cox involved?

19 A. Cox was not involved.

03:01:24 20 Q. What do you mean?

21 A. Well, I should, I should rephrase that. They, they, they
22 were part of the discussions initially, and then they withdrew
23 from the discussions before an agreement was reached. So they
24 kind of walked away, in essence, from the, from the
25 discussions.

1 Q. I want to turn to tab 6 in your binder, please.

2 This is PX -- excuse me, this is DX 63.

3 THE COURT: DX 63?

4 MR. GOULD: I move to admit.

5 THE COURT: Any objection?

6 MR. ELKIN: No objection, Your Honor.

7 THE COURT: It's received.

8 BY MR. GOULD:

9 Q. Mr. Marks, what is DX 63?

03:02:08 10 A. This is the document that is the agreement that I was just
11 talking about. It's titled "Memorandum of Understanding,"
12 instead of agreement, but it's essentially the agreement. So
13 it contains all the details of it.

14 MR. GOULD: And could we blow up that first
15 paragraph, please?

16 BY MR. GOULD:

17 Q. The agreement to do what?

18 A. To create the Copyright Alert System, to create CCI and
19 all the pieces around those two things.

03:02:42 20 Q. Could we highlight, and, Mr. Marks, could you read the
21 first sentence? It's a long one.

22 A. Sure. "Copyright infringement (under Title 17 of the
23 United States Code) on the internet ("Online Infringement") --
24 including the illegal distribution of copyrighted works such as
25 music, movies, computer software, gaming software, e-books and

1 the like via Peer-to-Peer ("P2P") file exchanges and other
2 illegal distribution via internet file hosting, streaming or
3 other technologies -- imposes substantial costs on copyright
4 holders and the economy each year.

5 Q. And then skipping down one sentence, starting with: The
6 availability of, could you read that one for us?

7 A. The availability of copyrighted content, including live
8 and recorded programming, from pirated sources harms legitimate
9 content creation and distribution.

03:03:48 10 Q. Was this an important aspect of the program for the record
11 business?

12 A. Yes. This, this highlights what I was just saying,
13 because this document is signed by all of the parties to the
14 agreement, including the ISPs, so the ISPs were -- you know,
15 this stated in a very straightforward way that all of this
16 infringement is a big problem for copyright owners. It
17 interferes with the ability to invest in new artists.

18 As, you know, I was talking about earlier, our member
19 companies had not only laid off a number of people that worked
03:04:25 20 at the companies, but they had cut artist rosters, they had
21 limited their investment, and so this was -- this was
22 recognizing, you know, all of those, all of those issues and
23 problems and challenges that we were faced with.

24 Q. In terms of the actual program, at a high level, can you
25 describe the framework for how it functioned?

1 A. Yeah. The Copyright Alert System refers to what was
2 called a graduated response program, meaning you sent notices,
3 and with each notice, it got a little more serious for the
4 user. So in this particular program, there were three stages:
5 an education stage, an acknowledgement stage, and a mitigation
6 stage.

7 Q. What was the education stage? What's the concept?

8 A. The concept of the education stage was to have kind of a
9 soft, hey, you're -- we noticed you're engaging in this. Here
03:05:28 10 are the works that we found. This, this is infringement, and
11 there are a lot of other alternatives to get music and movies
12 legally, so kind of please stop doing it.

13 Q. And what's the acknowledgement stage?

14 A. At the acknowledgement stage, the subscriber -- so again,
15 the acknowledgement stage would mean that they had received at
16 least one, if not two, previous notices, and the
17 acknowledgement stage was meant to make the subscriber
18 acknowledge that they had, they had received the notice and,
19 you know, read it, in essence, and understood, you know, what
03:06:12 20 was there.

21 So it was a way to ensure that it was actually read,
22 and it required the subscriber to essentially admit that they
23 had read it and were -- and knew of the infringement that they
24 were being notified about.

25 Q. And the third stage? What was that?

1 A. The mitigation measure was a penalty that was imposed if
2 there were additional notices that were sent. So if somebody
3 ignored the education, didn't act upon the acknowledgement, and
4 continued to infringe, when they got to that next stage, the
5 ISP according to the agreement would impose a penalty on the
6 subscriber.

7 So again, it was -- as I was describing earlier,
8 education programs alone tend not to work, at least in this
9 particular circumstance for us, and the mitigation measure at
03:07:12 10 the end was meant to have some teeth in it so that, you know,
11 it was more than just letting somebody know that the
12 infringement was going with no consequences.

13 Q. What were some of the mitigation steps that were part of
14 CAS?

15 A. So in the agreement, it mentions a few, and the idea was
16 that individual ISPs, because of their systems or technical
17 limitations or just the way they wanted to -- which one they
18 wanted to choose, we gave them some flexibility. That was the
19 agreement. So there were a number that were listed in the
03:07:47 20 agreement, and they included things like, you know, a temporary
21 suspension, where the person would have to -- would not be
22 able -- they'd go online, they wouldn't be able to access the
23 internet and would need to watch a video, take a test
24 afterward. That was one thing.

25 Another was what was called throttling the speeds for

1 the user uploading and downloading.

2 Q. What is throttling?

3 A. Yeah. So throttling is basically decreasing the speed, so
4 when you go on the internet, you're moving -- it takes a long
5 time for each page to load, you may not be able to upload
6 things if you want to send something to a friend, those kind of
7 things.

8 Think of it like if you're driving -- if a penalty
9 for an infraction when you're driving were, okay, your car only
03:08:47 10 goes 20 miles an hour now. So it had a -- it was meant to have
11 a meaningful impact beyond an annoyance because people wouldn't
12 be able to do the things that they wanted to do online.

13 Some -- another measure taken by one of the ISPs was
14 to limit access to the top 500 sites online, the most popular
15 sites, so that you couldn't access those. Those are some
16 examples.

17 Q. Anything that would stop any use of internet?

18 A. No. We -- I mean, we very much wanted the mitigation
19 measure to be termination, which would have stopped, you know,
03:09:29 20 use, but those fell short of that. And even in those
21 instances, there was a way -- if there was, for example, a
22 medical emergency and somebody was relying on their internet
23 because they had -- their telephone ran through their internet
24 line, voice over IP it's called, we wouldn't want to as a
25 result of copyright infringement interfere with somebody

1 getting an ambulance for a life-threatening, you know,
2 situation. So that was still allowed.

3 Q. Just to be clear, was termination required under CAS?

4 A. Termination was not required under CAS.

5 Q. Why not?

6 A. Well, we very much wanted it, but it was just not possible
7 to get that in the negotiation. The ISPs that we were
8 negotiating with wouldn't agree to that as part of the system.

03:10:29 9 Q. Why would you agree to a graduated response program that
10 didn't include termination?

11 A. We didn't have a lot of alternatives is the truth. That's
12 one thing. You know, we, we needed the cooperation of the ISPs
13 to try to address the problem. But second and, you know, maybe
14 really more importantly is that the agreement itself, we were
15 getting a lot of other things in the agreement. So, of course,
16 the specifics of the notice program were important, but things
17 like the creation of CCI that I mentioned earlier, where we
18 were -- you know, that organization on behalf of both the music
19 industry and the ISPs were talking about the seriousness of the
03:11:16 20 problem, how people could avoid infringing by securing their
21 wireless, so it was educating people in that way, and putting
22 together programs.

23 I mean, CCI, for example, put together a curriculum
24 for elementary and middle schoolers, which was something that
25 was really important, because a lot of the people who were

1 engaged in this were, were young and were learning that at very
2 young ages. And so the earlier we could -- in a school
3 curriculum, so again, not our industry just saying, hey, you
4 should stop this, but having this be part of a school
5 curriculum adopted by, you know, a countywide school system,
6 where those elementary or middle school students were being
7 taught what was right, what was wrong, what was legal, what was
8 not, was -- you know, that was a win for us.

9 Q. How did the, the copyright laws factor into your thinking,
03:12:19 10 RIAA's thinking in putting CAS together?

11 A. Well, the -- this agreement didn't replace the law in a
12 sense. So the obligations that existed under the law remained
13 there, and so, for example, we were talking earlier about if an
14 ISP wanted to avoid being sued, that they had to implement or
15 put together a policy to address this repeat infringer, you
16 know, individuals who were engaged in repeat infringement.

17 That still existed, and we basically just said, hey,
18 that still exists. We're not going to argue over what the law
19 is or what the law isn't. We're going to just park it here and
03:13:06 20 acknowledge that, yes, the law still governs, but we're going
21 to try and put this notice program, this graduated response
22 program together as a way -- another attempt for us to address
23 the problem.

24 MR. GOULD: Could we call up DX 63? Go down to
25 page 9, please. Oh, you're way ahead of me. Impressive.

1 Mr. Mark -- could you just show the page, please,
2 Mr. Duval.

3 BY MR. GOULD:

4 Q. Do you see there's a large footnote at the bottom of
5 page 9?

6 A. Yes.

7 Q. Can we look at that a little closer?

8 Are you familiar with this part of the MOU,
9 Mr. Marks?

03:13:50 10 A. Yes. Yes, I am.

11 Q. What do you understand -- maybe we should read some of it.
12 At the risk of some legal jargon, I think it's important.

13 Could we read the first sentence, please, and
14 highlight it?

15 A. Sure. So, yeah, let's take this in pieces because there's
16 a few different things contained in here. The first sentence
17 says: The parties acknowledge and agree that the limitations
18 on ISP liability under the DMCA are conditioned on an ISP's
19 adoption and reasonable implementation of a policy that
03:14:28 20 provides for the termination in appropriate circumstances of
21 subscribers and accountholders who are repeat infringers.

22 So this sentence was essentially saying, hey, there's
23 still this obligation to address repeat infringement if you
24 want to operate under the safe harbor and not be sued, and all
25 the parties are acknowledging and agree that that's there and

1 were kind of, you know, just putting that to the side for
2 purposes of the agreement. It still -- in other words, the law
3 still governs.

4 Q. And the next lengthy sentence, if you would, sir.

5 A. Notwithstanding the foregoing, (1) this agreement does not
6 and is not intended to create any obligation on a participating
7 ISP to adopt, implement, enforce, or otherwise take any action
8 in furtherance of a DMCA termination policy; (2) the adoption,
9 implementation, enforcement, or other action in furtherance of
03:15:39 10 a DMCA termination policy is not part of any step of the
11 Copyright Alert Program or enforceable under this agreement;
12 and (3) entering into this agreement is not, by itself,
13 intended to address whether a participating ISP has adopted and
14 reasonably implemented a DMCA termination policy.

15 Q. What do you understand that to mean?

16 A. This was basically a way for the ISPs to say, look, we're
17 going to help you with this. We want to help. This is -- you
18 know, we're coming together to create this system, but we don't
19 want our cooperation to be used against us in some way if, if
03:16:27 20 it doesn't work out or, you know, if we agree that this program
21 has these three stages that you come in later and say, sorry,
22 you only were -- you know, could have two stages or something
23 like that.

24 So it was, it was another way of saying, hey, the law
25 still exists, and nothing that we're doing here can be used if

1 there were ever any lawsuit later on between the parties.

2 Q. And I've got one more for you. Could you read the next
3 sentence, please?

4 A. Yeah. The next sentence: This agreement does not and is
5 not intended to establish any legal inference regarding any ISP
6 that does not participate in the Copyright Alert Program or to
7 address whether or not any ISP has adopted and reasonably
8 implemented a DMCA termination policy.

9 Q. And what did you understand that to mean?

03:17:22 10 A. This, this sentence was intended to say if you are an ISP
11 that's not part of it, you can't point to this -- if you
12 implement something along these lines, you can't point to it
13 and claim that you're not liable.

14 We didn't -- you know, again, this was a -- the
15 graduated response piece of this was a piece of a larger
16 agreement, and neither we nor the ISPs for that matter wanted
17 other ISPs basically picking individual pieces of it that they
18 liked and that -- but not signing the agreement because of
19 things that they didn't like, and then using that to shield
03:18:07 20 themselves from liability or make an argument that they, they
21 shouldn't be liable.

22 Q. This paragraph we just reviewed, was that an important
23 part of the program for RIAA?

24 A. I'm sorry, could you repeat that?

25 Q. Was this paragraph that we've just reviewed, was that an

1 important part of the program for RIAA?

2 A. Yes. Yes.

3 Q. Why?

4 A. Because it sets forth, first, that there was still an
5 obligation from the ISPs that were part of the program to, you
6 know, implement a repeat infringer policy. We weren't
7 replacing that obligation here.

8 And those that were not participating, those ISPs,
9 like Cox, for example, that were not participating couldn't
03:18:47 10 take -- couldn't use this in any litigation later on. That
11 was -- that's what we were agreeing to with the other ISPs, and
12 we wanted to make that clear.

13 Q. You described three stages, three steps within CAS. Do
14 you know what ISP -- the CAS ISPs were doing outside of CAS?

15 MR. ELKIN: Objection. May --

16 THE COURT: Yeah. Come to the sidebar, please.

17 NOTE: A sidebar discussion is had between the Court
18 and counsel out of the hearing of the jury as follows:

19 AT SIDEBAR

03:19:31 20 THE COURT: So there's a foundation problem, but
21 where are you going here?

22 MR. GOULD: I'm going to have him establish that he
23 does not know what the CAS ISPs were doing outside of CAS with
24 respect to the question of termination.

25 THE COURT: Doesn't know what the CAS --

1 MR. GOULD: -- ISPs --

2 THE COURT: -- ISPs, those who were involved in it
3 were doing outside of the conversations that he was having with
4 them? So he didn't know what they, what they went back to
5 their companies and said about it?

6 MR. GOULD: What they did after the three stages of
7 CAS.

8 THE COURT: Oh, about termination.

9 MR. GOULD: Correct.

03:20:07 10 MR. OPPENHEIM: Or with respect to notices from
11 non-RIAA, non-MPAA entities.

12 THE COURT: Mr. Elkin?

13 MR. ELKIN: Thank you, Your Honor. The concern I
14 have with that question is that it by force of nature invites
15 speculation. I don't know what's going to come out of his
16 mouth. If it's as benign as they're suggesting, that's one
17 thing, but it's inviting speculation, and if the jury hears
18 that, I want to be in the position of trying to encourage the
19 curbing of that.

03:20:37 20 THE COURT: I think if you can articulate the
21 question the way you just said it, you can ask it, but if he
22 says -- if he says he has, then we'll come back here.

23 MR. GOULD: I'll ask him a yes-no question.

24 THE COURT: Okay. All right. Thank you.

25 MR. ELKIN: Thank you, Your Honor.

1 THE COURT: Thank you.

2 NOTE: The sidebar discussion is concluded;
3 whereupon, the case continues before the jury as follows:

4 BEFORE THE JURY

5 THE WITNESS: Could I just add something to my last
6 answer, not answer the other one, something about one of the
7 sentences we reviewed?

8 THE COURT: No. Why don't we -- you'll perhaps have
9 a further opportunity, but why don't we move forward? Thank
03:21:28 10 you, sir.

11 THE WITNESS: Okay.

12 THE COURT: Go ahead.

13 BY MR. GOULD:

14 Q. Mr. Marks, do you know -- this is a yes-no question: Do
15 you know what the five CAS ISPs were doing outside of CAS on
16 the question of termination?

17 A. No.

18 Q. Any idea at all?

19 A. No.

03:21:49 20 Q. You mentioned three stages of CAS. Can you describe what
21 the process was after those three stages?

22 A. Sure. The agreement among the parties was, hey, we're
23 going to try this three-stage process, and I think what's
24 important to understand about this is this truly was an
25 experiment. There wasn't anything that had been done like this

1 before, and that's some of the reason why some of the language
2 is in here, because we were all taking a little bit of a leap
3 of faith to try something out in the hopes that, that it would
4 work, and -- I'm sorry, your question? I talked too long
5 without getting to your question before it fleeing from my
6 mind.

7 Q. Can you describe the process after?

8 A. Oh, right. Sorry. So, right. So we set up this, this
9 program, and the idea was, hey, we're going to try this. If it
03:22:51 10 doesn't work, everybody kind of goes on their merry way as, as
11 though -- if it doesn't work as to subscribers that continue to
12 get notices, we're just going to kind of go as if -- move on as
13 if the law that existed continued to apply. So, in other
14 words, there would continue to be a -- an obligation by the
15 ISPs to address repeat infringement through a policy. We would
16 continue to send notices, you know, like the ones that we
17 reviewed, etc.

18 So we were -- we weren't trying to say what happens,
19 you know, if -- we didn't come up with a fourth or a fifth
03:23:34 20 stage, anything like that.

21 Q. Did you have an understanding of what your options were
22 after those three steps?

23 A. Yeah. We could continue sending notices to the ISP and --
24 or we could file lawsuits against, you know, the individuals,
25 you know, again.

1 Q. What about the ISPs?

2 A. And -- well, the ISPs had an obligation if they wanted the
3 benefit of the safe harbor to -- and to avoid, you know,
4 copyright infringement, they needed to implement repeat
5 infringer policy.

6 Q. Did you give up after six steps?

7 MR. ELKIN: Objection.

8 THE COURT: It's hard to understand the question:
9 Did you give up after six steps? What -- so why don't you
03:24:20 10 rephrase the question.

11 MR. GOULD: Respectfully, Your Honor, that's exactly
12 what Mr. Elkin said in his opening, they gave up after six
13 steps.

14 THE COURT: Well, fine. What counsel said in his
15 opening statement may or may not have been clear to the rest of
16 us as well. If you want an answer to your question, ask it
17 more specifically.

18 MR. GOULD: Thank you, Your Honor.

19 BY MR. GOULD:

03:24:46 20 Q. Did RIAA do anything more on sending infringement notices
21 to ISPs after exceeding the six?

22 A. Yeah. We continued to send notices.

23 Q. Is CAS still in existence?

24 A. No.

25 Q. Why did it end?

1 A. I can speak only for our industry on the music side of
2 things. So the term of the agreement was four years. So that
3 took us to 2015, and we were in discussions to extend it for
4 another four years, for example, and we were reviewing some of
5 the early data that was coming in and analyzing that to
6 determine whether we thought it was working well enough to
7 continue.

8 Our members, after reviewing that, decided that the
9 money that we were spending on that program was better spent on
03:26:06 10 other antipiracy measures or enforcement measures, and so the
11 music industry withdrew. I think the, the movie industry
12 continued for some period of time, but it wasn't very long, and
13 it fell apart.

14 Q. Were there some extensions of any of the documents?

15 A. Yeah. There were some extensions as we were working
16 through -- you know, it took a little bit longer to get things
17 going in the first instance as we were ramping up and to get
18 fully operational. The discussions to extend took longer than
19 we anticipated. So we did some short extensions to enable us
03:26:47 20 to continue those discussions.

21 Q. Who was the antipiracy vendor that the content owners used
22 in CAS?

23 A. MarkMonitor.

24 Q. Is that the same -- and who is the antipiracy vendor that
25 the RIAA used to send notices to Cox?

1 A. MarkMonitor.

2 Q. In the CAS program, was there ever an opportunity to
3 review MarkMonitor?

4 A. Yes.

5 Q. How did that arise?

6 A. Well, the -- this agreement called for CCI, the
7 organization that we created, to ensure that the process on --
8 of sending notices was accurate and reliable, and so CCI hired
9 a third party to review that process, you know, in very kind of
03:27:41 10 detailed discussions, getting in under the hood of how
11 MarkMonitor's process worked and reviewing it, you know, in
12 depth, and they put a report out saying that after that review,
13 they could say that the, the MarkMonitor notice generation
14 process was reliable and accurate.

15 Q. Was there -- who was the company that did that review?

16 A. Stroz Friedberg.

17 Q. If I could direct you to tab 11 in your binder, please,
18 DX 130, "D" as in dog.

19 Is this the report you just described, sir?

03:28:26 20 A. Yes, it is.

21 MR. GOULD: Move to admit DX 130.

22 MR. ELKIN: No objection, Your Honor.

23 THE COURT: It's received.

24 BY MR. GOULD:

25 Q. Mr. Marks, do you see this label, "Independent Expert

1 Assessment of MarkMonitor AntiPiracy Methodologies," dated
2 October 31, 2012 --

3 A. Yes.

4 Q. -- by a company called Stroz Friedberg?

5 A. Yes.

6 MR. GOULD: For the record, Your Honor, this may be
7 one of the documents as well where we may have a
8 confidentiality issue that we can address down the road.

9 THE COURT: Okay.

03:29:01 10 BY MR. GOULD:

11 Q. Mr. Marks, do you see it says "Draft" on the top there?

12 A. Yes.

13 Q. Do you know if this was a draft?

14 A. I know that CCI published publicly this report sometime
15 right around this date, so I don't think this was, you know, a
16 draft in the sense of they were still working on it. I think
17 it was complete.

18 Q. Do you understand this to be the final?

19 A. Yes. Based on the date, I would say so.

03:29:35 20 Q. And if you could turn to page 1, please? And pull up the
21 middle paragraph.

22 Starting with the second sentence: Stroz Friedberg
23 conducted an assessment of the MarkMonitor Methodologies for
24 monitoring, verifying, and enforcing online copyright
25 infringement on P2P file sharing networks. Stroz Friedberg

1 assessed the efficacy of MarkMonitor's Methodologies to
2 monitor, identify, collect evidence, and generate notices to
3 P2P infringers by conducting a series of in-person and remote
4 interviews, reviewing documentation, and conducting technical
5 analysis.

6 Is that an accurate description of CCI's -- excuse
7 me -- Stroz Friedberg's charge here?

8 A. Yes. That was, that was the purpose of retaining them was
9 to do that exact analysis.

03:30:36 10 Q. Do you recall generally what Stroz Friedberg included?

11 A. Yeah. They found that MarkMonitor's methods and
12 operations in identifying the infringement and generating the
13 notices were, were sound, were, you know, reliable and
14 accurate.

15 MR. GOULD: And if we could turn to sub-2 under
16 "Summary of Findings and Recommendations," and pull up those
17 six bullets? Thank you.

18 BY MR. GOULD:

19 Q. Mr. Marks, could you read the summary of findings and
03:31:16 20 recommendations FROM Stroz Friedberg?

21 A. Sure. Based on our analysis and review of MarkMonitor's
22 Methodologies, Stroz Friedberg found that:

23 First, MarkMonitor's Methodologies effectively
24 identify P2P online copyright infringers.

25 Second: MarkMonitor Methodologies are well-developed

1 and matured.

2 Third: MarkMonitor's evidence collection in
3 connection with P2P infringement is robust, defensible, and
4 will withstand adverse party scrutiny or evidentiary
5 challenges.

6 Fourth: The Methodologies include appropriate checks
7 and balances at key points in the work flow to ensure accuracy.

8 Fifth: The reporting and notice-generating abilities
9 allow MarkMonitor to accurately report on identified
03:32:07 10 infringers.

11 And last: The Methodologies have a number of
12 inherent and added system redundancies designed to ensure that
13 MarkMonitor can provide continuous and consistent scanning.

14 Q. Did Stroz Friedberg make any recommendations for
15 improvements?

16 A. Yes. They made a handful of small recommendations.

17 Q. Did you have any reason to doubt Stroz Friedberg's
18 conclusions?

19 A. No.

03:32:35 20 Q. How -- did the Stroz Friedberg report factor into your
21 thinking about the reliability of MarkMonitor?

22 A. Yeah, it just reinforced what -- I mean, we had done our
23 own due diligence. We wanted this -- I mean, we had been using
24 MarkMonitor, so we had direct experience with them, and we
25 wanted to -- we had gone to a lot of effort to put this program

1 together. We would not have wanted to pick a vendor that had
2 any questions about its ability to do the work that they were
3 doing given the -- given the seriousness of the work.

4 Q. Was there ever another review and report of MarkMonitor?

5 A. Yeah. There was another one that followed by a company
6 called Harbor Labs, and the reason that report was done was
7 that one of the people who worked at Stroz Friedberg who had
8 worked on the Hill for Senator Leahy and then had done some
9 lobbying, including lobbying work for us on other issues, she's
03:33:57 10 now a federal judge in D.C.

11 When we -- when that came about, we didn't want --
12 CCI did not want there to be any appearance, even the optics --
13 there wasn't any questioning about what their findings were,
14 but we, we as a group of CCI took so seriously what we were
15 doing and wanted to ensure that everybody that was involved or
16 watching this program felt that it was fair and reliable, and
17 so out of kind of an abundance of caution, we got somebody else
18 to come in and review as well so that nobody could say, well,
19 that was the report -- or Stroz was the report where somebody
03:34:50 20 used to work for the RIAA lobbying.

21 We didn't -- it wasn't worth that, you know. We
22 didn't want that to taint anything.

23 Q. So you commissioned a second report?

24 A. We commissioned a second report.

25 Q. Is there anything in the second report that impacted your

1 views of the first report?

2 A. No.

3 MR. GOULD: Pass the witness, Your Honor.

4 THE COURT: All right. Why don't we take our
5 mid-afternoon break now. We'll take 15 minutes, and we'll come
6 back with cross-examination.

7 Thank you. You're excused.

8 NOTE: At this point, a recess is taken; at the
9 conclusion of which the case continues in the absence of the
10 jury as follows:

11 JURY OUT

12 THE COURT: All right. Mr. Marks, you're in the
13 middle of your testimony. Please don't discuss the testimony
14 you've given so far with anybody until we come back, all right?

15 THE WITNESS: Yes.

16 THE COURT: All right. Anything before we break?

17 MR. ELKIN: Not here, Your Honor.

18 THE COURT: Okay. All right. Then we're in recess.

19 NOTE: At this point, a recess is taken; at the
20 conclusion of which the case continues in the absence of the
21 jury as follows:

22 JURY OUT

23 THE COURT: Ready for our jury?

24 MR. OPPENHEIM: (Nodding head.)

25 THE COURT: All right. Joe, let's get the jury,

1 please.

2 NOTE: At this point, the jury returns to the
3 courtroom; whereupon, the case continues as follows:

4 JURY IN

5 THE COURT: All right. Please have a seat.

6 Mr. Elkin, proceed with cross-examination, sir.

7 MR. ELKIN: Thank you, Your Honor.

8 CROSS-EXAMINATION

9 BY MR. ELKIN:

04:01:49 10 Q. Good afternoon, Mr. Marks.

11 A. Good afternoon.

12 Q. Good to see you again.

13 A. Same here.

14 Q. I appreciate your time today. And speaking of time, are
15 you getting paid for your time today?

16 A. Yes.

17 Q. The RIAA is paying for your time?

18 A. The plaintiffs are.

19 Q. Okay. And how much are they paying you?

04:02:07 20 A. \$650 an hour.

21 Q. I'm sorry, how much?

22 A. 650 an hour.

23 Q. Okay. And have you -- were you paid for other work that
24 you've done in this case so far?

25 A. For the deposition testimony, yes.

1 Q. And the preparation as well?

2 A. Yes.

3 Q. How much have you received so far from the plaintiffs for
4 your assistance in this case so far?

5 A. I think that the work on the deposition was somewhere
6 around 20,000, maybe a little bit more. I don't remember the
7 exact number.

8 Q. Okay. And you're getting paid for your preparation and
9 for your testimony here today; is that correct?

04:02:44 10 A. Yes.

11 Q. Now, you mentioned a number of activities of the RIAA on
12 direct. RIAA also does lobbying, correct?

13 A. Yes.

14 Q. They're a lobbyist, right?

15 A. Excuse me?

16 Q. They -- they're a lobbyist?

17 A. Yes. They -- as I was saying earlier, part of advocacy
18 work is work with policymakers to explain importance of issues
19 to the industry, yeah.

04:03:16 20 Q. Okay. And you mentioned a number of networks or ISPs that
21 have been sued on direct. If I made notes carefully, I have
22 Charter, Bright House, Grande, and RCN.

23 Did I get that right?

24 A. Yes.

25 Q. And it is true, is it not, that -- withdrawn.

1 You understand that this lawsuit has to do with the
2 claims period that is -- relates to the period -- most of the
3 period of 2013 to 2014; is that correct?

4 A. Yes.

5 Q. And to your knowledge, these lawsuits weren't filed
6 anywhere near that time frame, correct?

7 A. Well, I mean, this lawsuit -- I don't know exactly when
8 this lawsuit was filed, what date specifically, but it was
9 within a couple of years ago, I think.

04:04:12 10 Q. Okay. Well, you left the RIAA at the end of 2018, right?

11 A. Yes.

12 Q. And you don't have any testimony that any of these
13 entities were actually sued by the RIAA with the exception of
14 Grande before you left, correct?

15 A. I believe that's correct.

16 Q. And -- now, as a general counsel of the company, you
17 worked closely with regard to the head of litigation to
18 supervise the litigations that were organized by the RIAA; is
19 that right?

04:04:50 20 A. Yes.

21 Q. And I think you've testified that individual lawsuits were
22 filed or organized on behalf of constituent record labels by
23 the RIAA from anywhere around 2004 to about 2008 or '9; is that
24 right?

25 A. That's correct for the, the lawsuits against individual

1 users of the P2P networks.

2 Q. Right. And with regard to those, I think you testified on
3 direct, but correct me if I'm wrong, that they were in the
4 hundreds; is that right?

5 A. So there were -- again, it depends on how -- what you,
6 what you count as a lawsuit. We had to file in court to get
7 the names of the people. Most of those after we received the
8 names and sent a letter to them did not go on in a full-blown,
9 you know, litigation because the overwhelming number of people
04:06:00 10 reached some kind of agreement or settlement.

11 Q. But there was a lawsuit that was filed against a
12 peer-to-peer user in the form of a John Doe lawsuit, and
13 eventually there were settlements; is that what you're saying?

14 A. Yeah. The John Doe was only filed because Cox, for
15 example, as an ISP would not give us the information on who the
16 subscriber was. If they had -- we had the IP information, as I
17 said, the IP address, so had they given that to us instead of
18 saying, hey, you've got to go file a -- what was called the
19 John Doe lawsuit, and then get a subpoena, we wouldn't have
04:06:39 20 needed to file those lawsuits. We could have contacted them
21 directly.

22 Q. Well, would it surprise you to learn that actually we
23 found some 5,000 of complaints that the RIAA filed during that
24 period of time with regard to claimed individual P2P file
25 sharers?

1 A. Do you mean John Doe suits?

2 Q. John Doe suits and regular suits against -- against
3 peer-to-peer file shares.

4 A. No, that wouldn't surprise me. What I was referring to
5 earlier was that the -- those were filed as John Doe suits, but
6 they didn't really move forward beyond that because they were
7 settled, and we only needed to do that because the ISPs were
8 not cooperating and giving us the names.

9 Q. Right. Now, I think you testified on direct that you
04:07:20 10 actually stopped the -- this campaign to file individual
11 lawsuits in part because of the fact that it had run its
12 course. Is that right?

13 A. Correct.

14 Q. And has it ever been suggested to you that the reason --
15 another reason why it was done is because it ended up being bad
16 PR for the record labels?

17 A. Not really, because we knew it wasn't going to -- it was
18 going to be bad PR when we started it. I mean, you don't --
19 there are not many industries that have to take that step. No,
04:07:52 20 no industry likes to sue their own customers, but we felt that
21 we didn't have any choice.

22 We knew that going in, that there was going to be a
23 tremendous amount of bad press, but we had also received bad
24 press when we sued Napster and Grokster, and, in fact, many of
25 the people who criticized RIAA for filing against those said

1 that we should actually sue the individuals instead of those
2 companies.

3 Q. Well, do you deny looking at a fusillade of bad press
4 articles about the RIAA's actions in filing these cases?

5 A. Would I deny?

6 Q. Would you deny having looked at or received or somehow
7 been brought to your attention bad, bad publicity related to
8 the RIAA's decision to go after individuals?

9 A. Again, we knew that going in, and frankly, the bad
04:08:45 10 publicity was the least of it. We had the head of our
11 organization death threats and had to have full-on 24-hour
12 security. So we undertook this knowing that there was going to
13 be a lot of backlash.

14 THE COURT: Okay. So listen to the question and
15 answer the question if you can, please.

16 THE WITNESS: Will do.

17 BY MR. ELKIN:

18 Q. You understand there was bad PR fall out, correct, from
19 having filed those suits?

04:09:07 20 A. Yes, there was bad PR.

21 Q. Now, piracy has -- if I understood your testimony
22 correctly, at least online piracy has existed at least going
23 back to 1999, right?

24 A. Yes.

25 Q. With the advent of Napster. You mentioned Napster and

1 Grokster and LimeWire and other defendants that RIAA sued,
2 correct?

3 A. Correct.

4 Q. And you understand that Cox is not a -- it's not being
5 sued here as a website, correct?

6 A. Yes, correct.

7 Q. And it's not being sued here as a web hoster?

8 A. Correct.

9 Q. And the individual lawsuits actually began prior to the
04:10:11 10 actual Grokster decision, but it continued through the Grokster
11 decision for several years thereafter, right?

12 A. Yes.

13 Q. And then it had, as you say, run its course, and then that
14 experiment was over, right?

15 A. Yes. We felt that we had achieved what we could achieve
16 in terms of our goals from the program.

17 Q. And then you entered a new experiment where you would send
18 notices to ISPs, if I understood your testimony; is that right?

19 A. Yeah. I mean, that was kind of pursuant to the framework
04:10:43 20 that was set up in the DMCA, so it was an alternative course.
21 I'm not sure I'd call that an experiment in the sense that it
22 was contemplated by law ten years earlier.

23 Q. Okay. Well, so 2009, around the time that you did that,
24 it took a couple years to negotiate the MOU that was signed in
25 2011, right?

1 A. I just want to be clear that I understand when you're
2 talking about general notice program and the CAS program,
3 because those were two different things.

4 Q. Right. I understand that. I referred to the notice
5 program, and now I'm referring to the CAS program.

6 A. Okay. So, I'm sorry, could you repeat your question about
7 the CAS?

8 Q. Yeah, I'm getting to that right now actually.

9 A. Okay.

04:11:22 10 Q. Thank you for that.

11 So the CAS program, I think you described toward the
12 end of your testimony as being experimental. Do you remember
13 that testimony?

14 A. Yes.

15 Q. And that's over, right?

16 A. Yes.

17 Q. And now you're suing -- now the RIAA is suing the ISPs,
18 right? What's going to be the next experiment?

19 A. I don't know. I don't -- I don't work there anymore. I
04:11:44 20 wouldn't have knowledge of that.

21 Q. Okay. I think you testified to this: Just to be clear,
22 the RIAA represents record companies, right?

23 A. Correct.

24 Q. And it's authorized to enforce the copyright of its record
25 company members, right?

1 A. Correct.

2 Q. And that would include the record labels that are part of
3 this case, right?

4 A. Yes.

5 Q. The RIAA is not a trade association for the music
6 publishers, right?

7 A. Correct.

8 Q. And it's not authorized -- or RIAA is not authorized to
9 enforce the copyrights of the music publishers, right?

04:12:31 10 A. That's generally correct, yes.

11 Q. And the RIAA, to your knowledge, hasn't filed any lawsuits
12 seeking to enforce the copyrights of any music publishers,
13 correct?

14 A. I don't believe so. I mean, there has been joint
15 litigation together from time to time.

16 Q. I'm not suggesting that there aren't. I'm suggesting that
17 RIAA never filed any claims on behalf of the music publishers
18 in the past; is that correct?

19 A. I believe so.

04:13:01 20 Q. And to your knowledge, the RIAA hasn't sent any
21 infringement notices on behalf of any of the music publishers,
22 right?

23 A. Correct.

24 Q. Now, the music publishers have their own trade
25 association, right?

1 A. Yes.

2 Q. The National Music Publishers Association, right?

3 A. Yes.

4 Q. Now, you testified at length about the Copyright Alert
5 System on direct. Is it true that you knew that there was
6 repeat infringement on every network and that you were trying
7 to address it the best way possible through the MOU?

8 A. Yes. We knew that there was repeat infringement on all --
9 you mean ISP networks?

04:13:59 10 Q. Let me, let me repeat the question. You knew that there
11 was repeat infringement on every network, and you were trying
12 to address it in the best way possible through the MOU; is that
13 correct?

14 A. I'm just asking whether "network" is referring to P2P
15 networks or ISP networks.

16 Q. So if I use that word "network," you have no idea what I'm
17 talking about?

18 A. It could be -- it's not that I don't have any idea. I
19 have two ideas. It could be P2P or the ISPs' network. So I
04:14:30 20 was just asking for a clarification.

21 Q. But standing alone, you don't understand what I'm saying;
22 is that correct?

23 THE COURT: He's answered your question.

24 MR. ELKIN: Okay.

25 THE COURT: Ask your next question.

1 MR. ELKIN: Sure.

2 MR. ELKIN:

3 Q. Did you ever form a view as to whether or not there were
4 repeat infringers using the networks of the participating ISPs
5 notwithstanding compliance with the MOU?

6 A. I, I don't believe we had data on that. That was part
7 of -- I don't, I don't know specifically. I don't, I don't
8 think we had that data. The ISPs have that data, not us.

9 Q. Okay. So let me just now rephrase the question. I'm
04:15:11 10 referring to ISP network, ISP network. We knew -- did you know
11 that there was repeat infringement on every ISP network and
12 that you were trying to address it in the best way possible
13 through the MOU?

14 A. Yes. We thought that the MOU -- the program of CAS was
15 the way that we hoped would address what we knew was pervasive
16 infringement.

17 Q. Now, the RIAA was a party to the MOU, right?

18 A. Yes.

19 Q. And you signed the agreement on behalf of the RIAA, right?

04:15:47 20 A. I did.

21 Q. As a representative of the record label members, right?

22 A. Well, as RIAA, because RIAA had its own role in the
23 agreement. So the individual record companies also signed it
24 in their own right. RIAA had a role as, for example, having a
25 seat on the CCI board and things like that.

1 Q. Right. And the four record labels that signed the
2 agreement were Sony, Warner, EMI, and Universal, correct?

3 A. Yes.

4 Q. I think you testified on direct that it took a couple of
5 years for the MOU to get negotiated; is that right?

6 A. Yes.

7 Q. So the negotiations would have began around 2008 and were
8 concluded and signed in or about 2011, right?

9 A. Correct.

04:16:58 10 Q. And thereafter, there were separate implementation
11 agreements that were entered into between the record labels and
12 Motion Picture entities on the one hand and the five ISPs on
13 the other; is that right?

14 A. Yeah. The individual ISPs. So there was a separate
15 implementation agreement with each ISP.

16 Q. Right. So there was -- I'm going to just refer to the
17 record labels and Motion Picture Studios as the content owners
18 for purposes of this question. Is that okay?

19 A. Yes.

04:17:30 20 Q. So you have the content owners on one side. They entered
21 into an implementation agreement with AT&T, correct?

22 A. Correct.

23 Q. And they also entered into an agreement with Cable Vision,
24 correct?

25 A. Correct.

1 Q. They entered into the -- the content owners entered into
2 an implementation agreement with Time Warner Cable, correct?

3 A. Yes.

4 Q. And the copyright owners also entered into an
5 implementation agreement with Comcast, correct?

6 A. Yes.

7 Q. And the content owners also entered into an implementation
8 agreement with Verizon; is that right?

9 A. Yes.

04:18:00 10 Q. And you, you participated in the negotiation of those
11 implementation agreements; is that correct?

12 A. Yes, I was involved.

13 Q. And Ms. Sheckler, who works with you, also was involved in
14 those discussions, right?

15 A. Yes.

16 Q. And the negotiations?

17 A. Yes, as were others at RIAA.

18 Q. And those implementation agreements -- and I'm going to
19 show them to you in a moment and offer them into evidence --
04:18:29 20 but do you recall when they were signed?

21 A. I don't recall specifically when each one was signed, but
22 it was in the months following the July 11, 2015, agreement --

23 Q. All right.

24 A. -- with everybody.

25 Q. So the agreement -- the implementation agreements were, to

1 your recollection, signed in or around 2012, right?

2 A. Yes, that's generally right.

3 Q. Right. And the -- and sometime thereafter, the program
4 went live, right?

5 A. Yes.

6 Q. And it was extended some six times, right?

7 A. I don't remember how many times it was extended, but it
8 was extended a number of times.

9 Q. All right. Well into 2016, right?

04:19:10 10 A. Well, the, the agreement -- the initial agreement was a
11 four-year agreement, so that took us to the middle of 2015, and
12 I think as I testified earlier, there were a number of short
13 extensions to allow the parties to continue discussions about
14 whether to renew.

15 Q. All right. And the various extensions that continued took
16 the CAS out to somewhere in the middle of 2016, right?

17 A. Yes.

18 Q. And that covers the claims period here, 2013-'14, right?

19 A. Yes.

04:19:44 20 Q. In terms of the time frame.

21 Now, I think you testified that there were three
22 major -- three main components of the, of the CAS notification
23 program. There was the notification or alert, and there's the
24 acknowledgement, and then there's the mitigation; is that
25 correct?

1 A. The first one we called the education stage.

2 Q. All right. There were two --

3 A. Yeah. Education stage, acknowledgement, and mitigation.

4 We referred to all of them as alerts.

5 Q. Right. And the first two alerts were the education
6 alerts, right?

7 A. One or two.

8 Q. Right. And then on the, the acknowledgement, there were
9 two acknowledgement alerts, right?

04:20:41 10 A. Yes.

11 Q. And then there were two -- one or two mitigation step
12 alerts; is that correct?

13 A. One or two, yes.

14 Q. And then at the end of that sixth, last alert, it was
15 discretionary with an ISP as to whether or not they needed to
16 do anything else, right?

17 A. No. I mean, it was -- the agreement itself didn't call
18 for specific action, but we all had an understanding that
19 whatever the law said about the requirements of implementing a

04:21:19 20 repeat infringer policy and otherwise addressing the

21 infringement, you know, still existed. So it wasn't as if they
22 got through six notices and then they didn't have to do
23 anything.

24 Q. I'm just talking about what was required by the agreement.

25 A. Yes.

1 Q. The implementation agreements with the five ISPs did not
2 require by the terms of those agreements anything for the ISPs
3 to do after the sixth alert; is that correct?

4 A. Yes.

5 Q. Let's take a look at -- this is DX 63 that was received
6 into evidence on your direct, tab 2 in your -- I don't know
7 whether it's tab 2 or what.

8 A. It's tab 2.

9 Q. Tab 2.

04:23:11 10 Take a look at page 13. It's romanette iv, which
11 starts on page 12, and then it -- the language that I want to
12 refer you to is the language on page 13. Tell me when you get
13 to that page.

14 A. Yep.

15 Q. Okay. So if you skip your eye down to five lines right
16 before romanette v, there's a sentence that begins: The
17 Participating ISP. Do you see that?

18 A. Yes.

19 Q. Could you read that, please?

04:23:58 20 A. The Participating ISP will, however, continue to track and
21 report the number of ISP Notices the Participating ISP receives
22 for that Subscriber's account, so that information is available
23 to a Content Owner Representative if it elects to initiate a
24 copyright infringement action against that Subscriber.

25 Q. Now, do you recall whether or not the participating ISPs

1 actually provided information of that kind to the content
2 owners?

3 A. I don't remember.

4 Q. Do you recall whether or not the RIAA on the record
5 labels' behalf ever instituted any action against any
6 subscriber of each of these five ISPs based on the information
7 that was provided here?

8 A. We did not.

9 Q. Take a look at the same document, Mr. Marks. Go to
04:25:34 10 page 7. I'm going to call to your attention item G. Could you
11 read that paragraph, please?

12 A. The first paragraph of G?

13 Q. It should be page 7, begins with the words: Each
14 Participating ISP.

15 A. All right. Every paragraph on that page begins with that,
16 but if it's the one right at G --

17 Q. Yeah, the one right at G.

18 A. Okay. Got it.

19 Q. Let me just -- it says: Each Participating ISP will
04:26:15 20 develop.

21 A. Right. Each Participating ISP will develop, implement and
22 independently enforce a Copyright Alert Program as described in
23 this Section 4(G) (each such program a "Copyright Alert
24 Program"), provided that each Participating ISP shall not be
25 required to exceed the notice volumes pertaining to its

1 Copyright Alert Program as established in Section 5 of this
2 Agreement. Each Participating ISP's Copyright Alert Program
3 will be triggered by the Participating ISP's receipt of an ISP
4 Notice that can be associated with a Subscriber's account and
5 will result in the Participating ISP sending one (1) or more
6 notices to the applicable Subscriber concerning the ISP notice,
7 as further described below (each such alert notice a "Copyright
8 Alert").

9 Q. Right. So that was the notice provisions that were
04:27:10 10 required to be followed, right?

11 A. Well, that paragraph is kind of setting it up by basically
12 saying, yeah, there's going to be this thing called the
13 Copyright Alert Program, and we're going to call the individual
14 notices a copyright alert.

15 Q. And the -- with regard to processing of the notices, it is
16 correct, is it not, that the ISPs were permitted to actually
17 cap the number of notices that they would process from content
18 owners; is that correct?

19 A. No. We reached an agreement on how many notices would be
04:28:33 20 sent as part of this program, including how to ramp that up
21 over time. The difference here is that the -- these ISPs had
22 created, they had spent millions and millions of dollars to
23 create the infrastructure to receive these notices and then
24 send one at each stage as they received them, and so we were
25 working cooperatively with them to ensure that they had time to

1 do that, that, you know, the notices ramped up over time as
2 those systems were put into place.

3 Q. Didn't you want to have the ISPs to receive an unlimited
4 number of notices under this agreement?

5 A. Yes. We would have liked as many notices as possible.

6 Q. And you weren't able to achieve that, right?

7 A. For the reasons that I stated earlier, where we were at
8 the table trying to get whatever we could get to work with the
9 ISPs in light of, you know, the full deal here, that's, that's
04:29:44 10 correct.

11 Q. And under each of the implementation agreements, the
12 content owners agreed, consistent with what you've just said,
13 to limit the notices that each of the ISPs in each of the
14 respective five implementation agreements that -- to process in
15 a given month, right?

16 A. As part of the entire deal, that was one piece of it. We
17 agreed to that.

18 Q. So they were capped, right?

19 A. It was an agreement on the number of notices at a
04:30:16 20 particular time. It wasn't the ISPs unilaterally telling us:
21 We will not accept more than 200 per day.

22 Q. But regardless of how it came about, the RIAA agreed to
23 limit from the ISPs' point of view how many notices it would
24 receive on a given -- in a given month, right?

25 MR. GOULD: Objection. Asked and answered many

1 times.

2 THE COURT: Yeah. Overruled.

3 You can answer once again.

4 THE WITNESS: Can you repeat it again?

5 BY MR. ELKIN:

6 Q. Sure. The content owners agreed under the MOU to -- and
7 the implementation agreements to permit the ISPs to limit the
8 number of notices it could send in a given month; is that
9 correct?

04:31:00 10 A. Yes. There was an agreed upon number. I don't know how
11 to say it any other way.

12 Q. And again, you mentioned a number of ISPs that were
13 actually sued most recently, but you didn't mention any of the
14 five with whom the content owners signed the CAS agreements,
15 correct?

16 A. That's correct. They're not among those that have been
17 sued recently.

18 Q. Did you form any conclusion that there was no longer any
19 peer-to-peer infringement on any of those networks for the five
04:31:45 20 ISPs?

21 A. No.

22 MR. ELKIN: I'm going to offer -- Your Honor, I think
23 it's going to be efficient if I do this in one fell swoop if I
24 can, if I'm permitted to do that, but I wanted to show
25 Mr. Marks for identification the five implementation

1 agreements.

2 THE COURT: Go ahead, yeah.

3 MR. ELKIN: So that would be DX 75, I think that
4 should be tab 4; DX 76, which is tab 5; DX 77, which is tab 6;
5 DX 78, which is tab 7; DX 79, which is tab 8.

6 BY MR. ELKINS:

7 Q. Take a moment and review those documents, and if you can
8 identify them for us, we'd appreciate it.

9 A. These do appear to be the implementation agreements. I
04:33:22 10 won't take a look at every last page, but from a quick review,
11 it does appear that.

12 Q. So just so it's clear, DX 75 is the agreement between the
13 content owners and AT&T?

14 A. 75 is AT&T, yes.

15 Q. And DX 76 is the agreement -- implementation agreement
16 between the content owners and Comcast?

17 A. Yes.

18 Q. And DX 76 is the implementation agreement between the
19 content owners and Cable Vision?

04:33:59 20 A. Yes.

21 Q. And DX 78 is the implementation agreement between the
22 content owners and Time Warner Cable?

23 A. Yes.

24 Q. And DX 79 is the implementation agreement between the
25 content owners and Verizon?

1 A. Yes.

2 Q. Your Honor, I -- did you sign each of those agreements on
3 behalf of the RIAA?

4 A. Yes.

5 MR. ELKIN: Your Honor, I would offer each of those
6 five exhibits into evidence.

7 MR. GOULD: No objection.

8 THE COURT: They're received.

9 BY MR. ELKIN:

04:35:02 10 Q. Let's take a look at first at what should be tab 4. This
11 is the AT&T implementation agreement.

12 A. Yes.

13 Q. Why don't you go to page 14 of that agreement. See the --
14 it's "Attachment C-1 - Minimum Notice Volumes."

15 Do you see that?

16 A. Yes.

17 Q. Is that the -- is that where in this implementation
18 agreement the content owners and AT&T set forth how many
19 notices would be processed?

04:35:58 20 A. Yeah. I mean, this is -- we had broken it down into ISP
21 Tiers 1, 2, 3, based on the size of the ISP.

22 Q. And this had to do with the RIAA and the national -- and
23 the, the Motion Picture Association, right?

24 A. Yes.

25 Q. Of America, MPAA?

1 A. Yes.

2 Q. Now, I guess it's just the Motion Picture Association; is
3 that right?

4 A. Yes.

5 Q. So those volume levels relate to all of the constituents
6 that were involved in CAS, right?

7 A. Yes. It was for both music and movies.

8 Q. And take a look at Attachment D, page 16, "Mitigation
9 Measure(s)."

04:36:52 10 A. Yes.

11 Q. The second paragraph reads: AT&T will redirect
12 Subscribers to a "Landing Page" to complete meaningful
13 educational instruction on copyright.

14 Do you see that?

15 A. Yes.

16 Q. Is that your understanding as to the mitigation step that
17 was required by AT&T under this agreement?

18 A. Yes. I believe they had to take a test, the subscribers
19 had to take a test as part of that.

04:37:15 20 Q. Okay. And there was no mitigation step here that called
21 for the termination of an AT&T subscriber, correct?

22 A. That's correct. As I testified earlier, termination was
23 not something that we could get as part of this agreement.

24 Q. I'm just asking yes-or-no questions. If you can answer
25 them yes or no, I'd appreciate it.

1 A. Will do.

2 Q. Let's take a look, if we can, next at tab 5, which is the
3 DX 76, the Comcast implementation agreement. Let me direct
4 your attention to page 13. This is headed at the top
5 "Attachment C-1 - Minimum Notice Volumes."

6 Do you see that?

7 A. Yes.

8 Q. This is where the content owners and Comcast agreed to the
9 number of notices that would be required to be processed by
04:38:27 10 Comcast by all of -- for all of the participating content
11 owners; is that correct?

12 A. Correct.

13 Q. And take a look at pages 15, 16, 17, and 18, and I guess
14 it carries over to 19 as well. I apologize for that. On page
15 15, it's entitled "Mitigation Measure(s)." Can you describe
16 what, the mitigation measure here that was negotiated with
17 Comcast?

18 A. So basically, the, the -- anybody using the account when
19 they went to go online would be met with this pop-up that says:
04:39:27 20 An important message from Comcast. Your household's primary
21 accountholder must call Comcast security in order to have this
22 removed, and that they'll explain things about P2P and risks
23 associated with it and things like that.

24 Q. Okay. So there's no mitigation step here that requires
25 termination of the subscriber; is that correct?

1 A. Correct.

2 Q. Take a look now at DX 77, the Cable Vision implementation
3 agreement, and specifically page 13. This is the "Attachment
4 C-1 - Minimum Notice Volumes."

5 Do you see that?

6 A. Yes.

04:40:44

7 Q. This is what is -- was required with regard to the notices
8 that would need to be processed by the content owners -- by the
9 ISPs that were sent on behalf of the content owners under this
10 implementation agreement? Is that your understanding?

11 A. Yes.

12 Q. And then take a look at "Attachment D - Mitigation
13 Measure(s)," which is page 27. Could you tell the jury what
14 the mitigation step here is?

15 A. Temporary redirection to a Landing Page until the
16 Subscriber calls the Service Provider or its designee and
17 discusses with it the Copyright Alerts.

18 Q. And there's no -- there was no mitigation step here that
19 required Cable Vision to terminate the subscriber, correct?

04:41:25

20 A. Correct.

21 Q. Take a look at tab 7, Exhibit 78, the Time Warner
22 implementation agreement. Let's go to page 14, please. This
23 is the "Attachment C-1 - Minimum Notice Volumes."

24 Do you see that?

25 A. Yes.

1 Q. This sets forth the notices that the ISPs would process
2 from the copyright owners on a monthly basis under this
3 implementation agreement; is that correct?

4 A. Yes.

5 Q. And they were not -- just to be clear, your understanding
6 is that the -- with regard to both this and the other
7 implementation agreements that we've seen, there was no
8 obligation under the implementation agreements for the ISPs to
9 process any more notices than what was set forth here, correct?

04:42:32 10 A. Not under this program.

11 Q. Okay. And then take a look, if you will, at tab 8, the
12 Verizon implementation agreement, specifically, page 14,
13 "Attachment C-1 - Minimum Notice Volumes."

14 A. Yes.

15 Q. And this is setting forth the actual limit of notices that
16 the -- that Verizon would have to process on a monthly basis
17 sent by the copyright owners under this implementation
18 agreement?

19 A. Yes.

04:43:35 20 Q. And there would be no requirement for them to process any
21 more notices under this agreement; is that correct?

22 A. As part of this program.

23 Q. Under this program, correct?

24 A. Yeah, under the program.

25 Q. Right.

1 A. I'm not sure I'd say under the agreement, but under this
2 program.

3 Q. Okay. And then take a look at "Attachment D - Mitigation
4 Measure(s)" on page 25. Can you tell the jury what the
5 mitigation measure was here?

6 A. Page --

7 Q. 16 rather.

8 A. Yes. Verizon would reduce the speeds, upload and download
9 speeds for a period of two days, and in addition, they're
04:44:25 10 saying they would redirect to a landing page to view an
11 educational video at the acknowledgement stage.

12 Q. Okay. And there was no termination of an ISP subscriber
13 that was required as a mitigation step under this agreement,
14 correct?

15 A. Correct.

16 Q. Now, is it your understanding under the MOU that despite
17 the notice requirements here, that if the call centers of the
18 ISP would be unable to process as many notices as would be
19 required, there'd be some dispensation?

04:45:19 20 A. No, I don't recall that provision.

21 Q. And do you recall any provision under the MOU that
22 addresses the extent to which notices would be -- the
23 processing of notices requirement would be lessened to the
24 extent there was a technological inability for the ISPs to
25 process those notices?

1 A. The way I recall it is that because this was experimental,
2 the ISPs didn't know how many calls would be generated that
3 they would have to answer, you know, to differentiate between
4 this stage or that stage or whatever it was, and they asked for
5 a provision that said basically if these are so through the
6 roof that we literally cannot absorb them, there was kind of
7 like a fail-safe for them to be able to just pause everything
8 to, you know, kind of get their house in order and address it.

9 Q. You thought that was reasonable, right?

04:46:26 10 A. I thought that it was -- I mean, it wasn't a provision
11 that I personally liked in the agreement, but it was part of an
12 agreement where we were getting a lot of other things, so this
13 fell into the we had to compromise on that.

14 Q. Did you think the ISPs were being irrational in asking for
15 that?

16 A. I, I knew from the discussions that this was a true
17 fail-safe, you know, that they just didn't know how this was
18 going to go given that we were doing something new here, and
19 they just wanted to be able to hit the pause button if
04:47:02 20 necessary. So again, it got baked into the agreement as part
21 of the overall compromise.

22 Q. Okay. So I know we've gone through five agreements, and
23 to make it easier, I think, for the jury and for all concerned,
24 I'm just going to show you -- have exhibited on your screen a
25 demonstrative, Your Honor, that we showed to counsel earlier

1 today.

2 THE COURT: Any objection?

3 MR. GOULD: Yes, Your Honor.

4 THE COURT: All right. Come to the sidebar then,
5 please.

6 NOTE: A sidebar discussion is had between the Court
7 and counsel out of the hearing of the jury as follows:

8 AT SIDEBAR

9 MR. ELKIN: So, Your Honor, let me just show this to
04:47:51 10 you and explain the purpose for it. We've reviewed a lot of,
11 in a quick fashion, all of the agreements that were dense. I
12 just thought I would -- this would be the demonstrative, which
13 basically goes through the two points in the five agreements,
14 and I was just going to have him summarize for me, you know,
15 the effect of what he just testified to.

16 MR. GOULD: Mr. Elkin asked Mr. Marks on several
17 occasions whether that was a cap, that was a cap, that was a
18 cap, and Mr. Marks did not agree to that. He said this was a
19 negotiated agreement where we agreed to certain things in the
04:48:28 20 context of a compromise. He specifically did not agree this
21 was a cap.

22 THE COURT: I'm going to -- not going to allow the
23 demonstrative. You can, you can go over it with him --

24 MR. ELKIN: Sure.

25 THE COURT: -- one at a time.

1 So just do that. Then you can perhaps revise it
2 slightly and use it later on in argument to the jury, but
3 demonstratives, you know, if they've got language that you
4 disagree on, I'm not going to allow that during the course of
5 the question and answer of witnesses. All right.

6 MR. ELKIN: Understood, Your Honor. Thank you.

7 THE COURT: All right. Thank you.

8 NOTE: The sidebar discussion is concluded;
9 whereupon, the case continues before the jury as follows:

04:49:49 10 BEFORE THE JURY

11 BY MR. ELKIN:

12 Q. So I may have gone too fast, Mr. Marks, and failed to ask
13 a question that related to the Time Warner Cable agreement as
14 it relates to the mitigation. Go to page 16 in this tab.

15 A. Which tab is this?

16 Q. It's tab 7. Yeah, it's tab 7.

17 A. That's right.

18 Q. Could you tell the jury what this mitigation measure is
19 here?

04:50:18 20 A. Temporary redirection to a Landing Page until the
21 Subscriber contacts the Participating ISP to discuss with it
22 the Copyright Alerts.

23 Q. Okay. So -- and was there any termination step that was
24 required under the program as set forth in this implementation
25 agreement for Time Warner to terminate an ISP subscriber as a

1 mitigation step?

2 A. No.

3 Q. So just to review each of what we -- each of these
4 agreements, the implementation agreements, there was -- for
5 each of the ISPs, there was a, a limit to the number of notices
6 that would be required for them to process in a given month,
7 correct?

8 A. It's an agreed upon notice volume.

9 Q. Right, agreed upon notice volume. They did not have to
04:51:15 10 exceed the volume that was set forth in Attachment C-1 to each
11 of those agreements, correct?

12 A. For this program. I just want to be clear that they would
13 accept notices beyond the program.

14 Q. You've made it very clear, and I'm clear on it as well, by
15 the way. There was no requirement under this program under
16 this agreement for the ISPs to process notice volumes that
17 exceeded the limits set forth in Attachment C-1 to each of
18 these agreements; is that correct?

19 A. Yes.

04:51:47 20 Q. And there was no requirement under each of these
21 implementation agreements for an ISP to terminate a subscriber
22 as part of this program; is that correct?

23 A. Yes.

24 Q. On direct, counsel showed you a demonstrative, I think it
25 was having to do with this -- I don't have copies of it here.

1 It's this pie chart, the one that's one day, February 23, 2010,
2 and one is a one-year, March 1, 2009 - February 28, 2010.

3 Do you see that?

4 A. Yes, I remember it.

5 Q. You remember that?

6 You understand that this was significantly prior to
7 the claims period here, 2013-'14?

8 A. Yeah. I mean, the dates on there are different than the
9 claims period.

04:53:02 10 Q. And the, the volume of notices that Cox agreed in
11 accordance with the e-mail exchange between Ms. Sheckler and
12 Cox in 2013 was 600 a day, correct?

13 A. Yeah. At some point in 2013, it increased to 600.

14 Q. And have you been made aware of the fact that for the vast
15 majority of every day in 2013 and 2014, MarkMonitor didn't even
16 exceed 500 notices per day?

17 A. I don't know about every day, but as I explained on
18 direct, that was a mistake on our end in communicating the
19 increase to MarkMonitor.

04:53:46 20 Q. Okay. And by the way, MarkMonitor, the relationship
21 between MarkMonitor and the parties here was MarkMonitor and
22 RIAA, right?

23 A. Yes, I believe that's right.

24 Q. And Cox and the RIAA had their own communications
25 regarding the number of notices, correct?

1 A. Yes. So we had the discussion with Cox directly, and we
2 failed -- once, once Cox said, yes, we'll try 600 -- and,
3 again, I didn't realize this at the time, but that did not make
4 its way to MarkMonitor as a vendor, and that was our fault.

5 Q. Okay. So you also referenced in response to questions put
6 to you by counsel on direct that you hadn't sued any of the
7 four so-called peer-to-peer protocols that we're fighting about
8 here; that is to say, eDonkey, BitTorrent, Ares, and Gnutella,
9 right? Do you remember that?

04:54:58 10 A. Not the protocols. We had sued individual companies that
11 were using those protocols.

12 Q. Are you aware that BitTorrent is a company that actually
13 is related to the BitTorrent protocol?

14 A. Well, it's, it's not the same kind of thing. No, it's
15 not. It was a company that kind of co-opted the name to use
16 it, and they had all -- we had discussions with them as well,
17 that particular company, but we did not equate that company
18 with BitTorrent. It was very confusing.

19 Q. Your testimony is that you determined that it was not the
04:55:35 20 same entity, correct?

21 A. It was not, no. I don't believe it was the same entity,
22 because BitTorrent was an open source technology protocol.

23 Q. And did you ever file any lawsuit, RIAA, against any of
24 the creators of any of these peer-to-peer protocols, these
25 four?

1 A. I don't believe so. I'm trying to think whether there
2 were any individuals in their capacity as individuals, but I
3 don't, I don't remember that.

4 Q. Okay. And one of the things that I think I heard you say
5 on direct is that, that you thought that CAS was a good program
6 because it had graduated response. Do you remember that? Do
7 you think graduated response is a, is a program designed to try
8 to address copyright infringement?

9 A. Yes. That was one of the goals.

04:56:28 10 Q. And also, you thought that CAS was useful because it had
11 some teeth, correct?

12 A. Yes. More than just a mere education program.

13 Q. Now, I think you testified on direct that you had reviewed
14 certain material by this company called Stroz Friedberg,
15 correct?

16 A. Yeah. Stroz Friedberg, yeah.

17 Q. And actually, Stroz Friedberg, in addition to what you
18 testified on direct, actually assessed how each ISP actually
19 implemented the CAS, correct?

04:57:20 20 A. Yes.

21 Q. So -- Your Honor, collectively, I'd like to provide five
22 documents that we're going to offer into evidence.

23 THE COURT: He's going to show you multiple
24 documents, and take your time to go through them, and we'll
25 proceed from there. Go ahead.

1 THE WITNESS: Thank you, Your Honor.

2 MR. ELKIN: This would be -- should be tab 9, which
3 is DX 80; tab 10, which is DX 81; tab 11, which is DX 82; tab
4 12, DX 83; and tab 13, DX 84.

5 BY MR. ELKIN:

6 Q. If you could review those and identify whether these are
7 documents you've seen before.

8 A. So tab 9 appears to be the report for AT&T. Tab 10 has
9 the Comcast report at the top, but I think it's got all the
04:59:05 10 others included in the same tab as well.

11 Q. Okay.

12 A. So the Time Warner one is in there. The AT&T one is in
13 there again.

14 Q. Well, let me do this. I want to make sure that we're -- I
15 thought I would make it easy, but I have to confess I did not
16 fly spec exactly the binder that you have. So maybe we have to
17 do this, unfortunately, the old-fashioned way.

18 Let me show you --

19 MR. GOULD: If I could -- I think I could make a
04:59:47 20 clarification for the record, Mr. Elkin, that may be able to
21 help. First, DX 80, I happened to look at last night -- 81. I
22 believe the first 25 pages, Comcast is (inaudible).

23 Secondly, Your Honor, for DX 80 through 84 and DX 75
24 through 79, that implicates the confidentiality issue we spoke
25 about earlier.

1 THE COURT: All right. Well, there won't be --
2 they'll be published and the confidentiality agreements will be
3 complied with based on my order. Maybe we need to take a step
4 back and go through them one at a time. Is that what you're
5 proposing to do?

6 MR. ELKIN: Yeah. I apologize to the Court and the
7 jury for this. Let's just --

8 THE WITNESS: It just looks to me that in one -- in
9 tab 10, all of them are included.

05:00:45 10 THE COURT: Sorry?

11 THE WITNESS: It looks like tab 9 has one, tab 10 has
12 four or five of these, and then tab 11, 12, and 13 have one.
13 So I think in compiling this, tab 10 has more than just the one
14 you meant to include in the tab.

15 BY MR. ELKIN:

16 Q. Yes. I apologize for that. So let's just do them one at
17 a time, if we can. And I -- so let's go first of all to the
18 AT&T one, Exhibit DX 80.

19 Have you seen this before?

05:01:21 20 A. Yes.

21 MR. ELKIN: Your Honor, I would offer DX 80 into
22 evidence.

23 THE COURT: Any objection?

24 MR. GOULD: No objection.

25 THE COURT: It's received.

1 BY MR. ELKIN:

2 Q. Now, let's go to tab 10, which is DX 81. This is the one
3 for Comcast that has an extra document in it.

4 Yeah, I see what you're saying now, and I apologize.
5 If you just look at, at the bottom right-hand side, Mr. Marks,
6 the Bates stamp number DX 0081-0001, and if you take it to
7 -0025, what is that?

8 A. Yeah, that's the Stroz Friedberg report with respect to
9 Comcast.

05:02:16 10 Q. Okay. You've seen this before?

11 A. Yes.

12 Q. And, and then let's take a look at DX 81, from page 26 to
13 49. What is that?

14 A. That is the Stroz Friedberg report with respect to Time
15 Warner Cable.

16 Q. Okay. And you've seen that before?

17 A. Yes.

18 Q. Okay.

19 MR. OPPENHEIM: I'm sorry, what?

05:03:14 20 MR. ELKIN: I'm going to move all of this into
21 evidence after we go through the pages. It will be less
22 confusing.

23 THE COURT: All right.

24 MR. OPPENHEIM: Could you just tell us through which
25 page that is? I lost track, sorry.

1 MR. ELKIN: Yeah, of course. So that was --

2 THE WITNESS: 26 to 49.

3 MR. ELKIN: Yeah, 49. The next one begins at 0050,
4 and it goes to --

5 THE WITNESS: That one is the same as the one in
6 tab 9. The one starting at 0050 is the same as tab 9.

7 MR. ELKIN: So this is an extra. Oh, I see. Okay.

8 So Ms. Leiden just informed me that I can actually
9 move into evidence the DX 81, which is the Comcast report, and
05:04:04 10 then I can -- the other ones make sense.

11 THE COURT: Any objection?

12 MR. GOULD: I think the record is a bit unclear on
13 this. We don't object to the substance.

14 THE COURT: Let's just take a look at them tonight
15 after we recess.

16 MR. GOULD: Thank you, Your Honor.

17 THE COURT: And we'll see whether we have -- so we
18 have clean exhibits.

19 MR. GOULD: I would propose provisional admission
05:04:32 20 subject to making sure --

21 THE COURT: Yeah, that's fine. All right. Thank
22 you, Mr. Gould.

23 BY MR. ELKIN:

24 Q. Okay. So now let's take a look at tab 11, which is DX 82.

25 A. Yes.

1 Q. What is that?

2 A. That is the Stroz Friedberg report with respect to Cable
3 Vision.

4 Q. Okay. Have you seen this before?

5 A. Yes, I have.

6 MR. ELKIN: Your Honor, I move DX 82 into evidence.

7 THE COURT: Any objection?

8 MR. GOULD: No objection.

9 THE COURT: All right. Received.

05:04:58 10 BY MR. ELKIN:

11 Q. Take a look at tab 12, DX 83. Tell me if you've seen that
12 before.

13 A. We've seen that one before, too.

14 Q. What is that?

15 A. That is the Time Warner Cable Stroz Friedberg report.

16 MR. ELKIN: Okay. I move DX 83 into evidence.

17 THE COURT: Any objection?

18 MR. GOULD: No objection.

19 BY MR. ELKIN:

05:05:20 20 Q. And take a look at tab 13, DX 84. Have you seen that
21 before?

22 A. Yes, I have.

23 Q. What is it?

24 A. It's the Stroz Friedberg report with respect to Verizon.

25 MR. ELKIN: Your Honor, I move DX 84 into evidence.

1 THE COURT: Any objection?

2 MR. GOULD: No objection.

3 THE COURT: Received.

4 BY MR. ELKIN:

5 Q. Your understanding is that Stroz Friedberg actually as
6 part of its review looked at the extent to which the ISPs were
7 operating in accordance with the implementation agreements,
8 correct?

9 A. Yes. As part of the MOU that this analysis, a review
05:06:07 10 would be done.

11 Q. Okay. And these documents set forth, among other things,
12 what mitigation steps the ISPs were taking under the
13 implementation agreements, right?

14 A. Yes. I believe they're included in that.

15 Q. In reviewing them, did you observe to your knowledge
16 anything that was inaccurate in these reports?

17 A. I haven't reviewed them that thoroughly recently, so I
18 can't say that now, but I did review them at the time and don't
19 remember there being anything inaccurate.

05:06:48 20 Q. Okay. So I believe on direct, Mr. Marks, you made
21 reference to a Harbor Labs, correct?

22 A. Yes.

23 Q. And who are they again? Since it's been a while since
24 your direct.

25 A. Sure. This was the vendor that was hired after the Stroz

1 Friedberg analysis of the MarkMonitor systems to address the
2 optics that somebody at Stroz had worked on behalf of RIAA at
3 one point. So Harbor Labs was the company that we hired so
4 that we had another report.

5 It wasn't that there was anything inaccurate in the
6 Stroz report. It was just, again, we wanted to ensure that
7 there was, you know, complete transparency as well as that
8 there were no questions about the reliability or accuracy of
9 these reports.

05:08:19 10 Q. So to avoid the appearance of impropriety, right?

11 A. Yes.

12 Q. I'd like to, to show you a document that's been marked for
13 identification as Defendant's 89.

14 THE COURT: Joe, I think -- is it in the book?

15 MR. ELKIN: It's not in the book.

16 THE COURT: Joe --

17 MR. ELKIN: This issue cropped up on direct, so we're
18 just dealing with it now.

19 THE COURT: Give it to him now.

05:08:53 20 THE WITNESS: Yeah, thank you.

21 BY MR. ELKIN:

22 Q. Do you recognize DX 89?

23 A. Yes.

24 Q. What is it?

25 A. This is the report by the company, Harbor Labs, to

1 evaluate and review the MarkMonitor systems.

2 MR. ELKIN: Your Honor, I offer DX 89 into evidence.

3 THE COURT: Any objection?

4 MR. GOULD: Object to the same confidentiality
5 agreement.

6 THE COURT: Okay. All right. It will be received.
7 The confidentiality will not be honored here. It will be made
8 public. Thank you.

9 MR. ELKIN: Mr. Marks, thank you very much. I have
05:09:28 10 no further questions.

11 I pass the witness.

12 THE COURT: All right. Redirect?

13 MR. GOULD: Thank you, Your Honor.

14 Could you pull up that last document, DX 89, please?
15 The very last one.

16 REDIRECT EXAMINATION

17 BY MR. GOULD:

18 Q. Mr. Marks, this is the Harbor Labs report that you
19 described, correct?

05:10:08 20 A. Yes.

21 Q. And could we just -- could you read the title, the header?

22 A. "Evaluation of the MarkMonitor AntiPiracy System."

23 Q. And can we zoom in on the portion beginning: As
24 described?

25 And could you read the findings -- could you read the

1 highlighted portion of the DX 89 Harbor Labs report on the
2 MarkMonitor system, please?

3 A. As described in further detail in this document, we have
4 found that the antipiracy system, one, is designed to correctly
5 identify file sharing without generating false positives; two,
6 undergoes testing to increase confidence in the implementation
7 of the design; and, three, generates thorough case data for
8 alleged infringement tracking.

9 Q. Thank you. You can pull that down.

05:11:04 10 Mr. Marks, you were asked a number of questions about
11 implementation agreements in CAS. Do you recall that?

12 A. Yes.

13 Q. Do those agreements say anything about ISPs' conduct
14 outside of CAS?

15 A. No.

16 Q. You were asked several questions about your compensation
17 in this matter. Do you recall that?

18 A. Yes.

19 Q. Why are you being compensated here, Mr. Marks?

05:11:28 20 A. Because I'm taking time away from the business that I'm
21 trying to run, and my time is very valuable, frankly, because
22 it's a 24-hour/7 kind of job.

23 Q. Why is it a 24/7 job?

24 A. Every cliché that exists about startups I can tell you is
25 pretty much true, including the amount of work that's required.

1 Q. Is your compensation here today in any way based on the
2 substance of your testimony?

3 A. Not at all.

4 Q. You were asked some questions about -- excuse me for a
5 moment.

6 THE COURT: Yes, sir.

7 BY MR. GOULD:

8 Q. Mr. Marks, you were asked some questions about the Stroz
9 Friedberg report about Mark- -- excuse me.

05:12:45 10 Mr. Elkin asked you several questions about Stroz
11 Friedberg's reports on the ISPs' conduct within CAS. Do you
12 recall that?

13 A. Yes.

14 Q. Did the Stroz Friedberg reports on the CAS ISPs have
15 anything to do with the ISPs' behavior outside of CAS?

16 A. No.

17 Q. You were asked some questions about -- the
18 word "experiment" has come up a lot, experiments in the process
19 of figuring out antipiracy measures. Do you recall that?

05:13:19 20 A. Yes.

21 Q. Why does the -- why does the RIAA experiment in different
22 ways with different antipiracy approaches?

23 A. Well, in this case, we were hit by an avalanche, you know,
24 in 1999 with Napster, and it continued for many years, and our
25 industry was the so-called canary in the coal mine. We were

1 the -- we were the first to suffer, you know, the consequences
2 of all of the illegal distribution and copying that went on in
3 those systems, and, you know, this -- I mean, stepping back, in
4 the history of intellectual property enforcement, there had
5 never been anything like this, and so there was no playbook by
6 which you look back to and say, oh, if, you know, this happens,
7 you just do this.

8 We had to create that, you know, entirely and use our
9 best judgment with respect to different kinds of things that
05:14:21 10 would help or that we thought might help the problem.

11 Q. Do you recall some questions about the record companies
12 and the RIAA's work with the publishers?

13 A. Yes.

14 Q. Do you know if the publishers, music publishers were a
15 part of the Napster lawsuit?

16 A. Yes.

17 Q. Were they?

18 A. Yes, they were.

19 Q. And what about the Grokster lawsuit?

05:14:46 20 A. Yes.

21 Q. And the Kazaa lawsuit?

22 A. Yes.

23 Q. I believe -- were the Grokster and Kazaa together?

24 A. Yeah, they were together, but they were --

25 Q. You were asked some questions about suing BitTorrent. Do

1 you remember that?

2 A. Yes.

3 Q. Is there a company that you're aware of named BitTorrent?

4 A. There was a company at bittorrent.com, and my recollection
5 is basically they were trying to position themselves as
6 BitTorrent, but they really weren't BitTorrent, and I gather
7 that that internet name was not taken, so they were able to
8 take that. They were a site that was, you know, trying to
9 build some kind of business or another that was called that.

05:15:32 10 It was not -- they weren't software, P2P software
11 being used on the BitTorrent protocol. It was different from
12 that.

13 Q. Is that company or website, BitTorrent, the same or
14 different as the BitTorrent protocol that we've been discussing
15 here?

16 A. Different.

17 Q. Do you understand which of those two BitTorrents is at
18 issue with respect to the RIAA notices to Cox?

19 A. Yes. It's not that company, bittorrent.com. It's
05:16:19 20 BitTorrent the P2P protocol.

21 Q. And has the RIAA or the record industry ever sued the
22 BitTorrent protocol that's at issue in this lawsuit against
23 Cox?

24 A. No. And, you know, neither have we sued the people who,
25 you know, created the protocols, because they were creating a

1 technology. The technology wasn't -- we weren't trying to sue
2 the technology out of existence. We were trying to address bad
3 actors who were using that technology for the widespread
4 infringement that we've discussed.

5 Q. You were asked some questions about agreements that the
6 RIAA and the recording industry made with ISPs. Do you recall
7 that?

8 A. Yes.

9 Q. Did the RIAA or the record companies ever agree that Cox
05:17:12 10 could ignore the first notice sent to it?

11 MR. ELKIN: Objection.

12 THE COURT: Overruled. Foundation? I think he's
13 discussed this.

14 MR. ELKIN: It's a leading question.

15 THE COURT: It was a leading question. I'll allow
16 it.

17 THE WITNESS: No. That's not something we would have
18 agreed to.

19 MR. GOULD: No further questions.

05:17:34 20 THE COURT: All right.

21 MR. ELKIN: Can I please have one question?

22 THE COURT: Is it going to be one? Yes.

23 RECROSS EXAMINATION

24 BY MR. ELKIN:

25 Q. Pull up, if you will, DX 89, the Harbor Labs exhibit.

1 A. Yep.

2 Q. Mr. Gould asked you about a paragraph that begins with:
3 As discussed in further detail. Could you read the following
4 paragraph that begins: There are, however, and then there are
5 three bullet points?

6 A. Yes. There are, however, aspects of the system that we
7 believe must be improved: One, consistent and regular
8 end-to-end (whole-system) testing; two, improved verification
9 approaches, including tamper-evident infringement case data;
05:18:19 10 three, tighter and more principled controls over employee
11 access to sensitive data.

12 Q. Any reason to disagree with that comment?

13 A. No.

14 MR. ELKIN: No further questions, Your Honor.

15 THE COURT: All right. May Mr. Marks be excused?

16 MR. GOULD: Yes, Your Honor.

17 MR. ELKIN: Yes, Your Honor.

18 THE COURT: All right. You're excused with our
19 thanks, Mr. Marks. Please don't discuss the testimony you've
05:18:40 20 given today with anyone until our trial is over, all right?

21 THE WITNESS: Yes. I understand. Thank you.

22 THE COURT: Okay. Good. Have a good evening. Thank
23 you, sir.

24 THE WITNESS: Thank you very much.

25 WITNESS EXCUSED

1 THE COURT: I don't see any faces begging me to
2 continue on later tonight.

3 (Laughter.)

4 THE COURT: I have one.

5 Yeah. All right, we'll adjourn for tonight. We'll
6 start at 9:00 tomorrow morning. Again, please don't discuss
7 the case with anybody or do any research or investigation.
8 Have a good evening. We'll see you tomorrow morning. Thank
9 you.

05:19:29 10 THE JURORS: Thank you.

11 NOTE: At this point, the jury leaves the courtroom;
12 whereupon, the case continues as follows:

13 JURY OUT

14 THE COURT: All right. Anything we need to discuss
15 before we break for tonight?

16 MR. ELKIN: Not for defendants, Your Honor.

17 THE COURT: Okay.

18 MR. GOULD: No, Your Honor.

19 THE COURT: All right. Thank you-all. We're in
05:20:15 20 recess until 9:00 tomorrow morning.

21 NOTE: At this point, the December 3, 2019, portion
22 of the case is concluded.

23

24

25

CERTIFICATE OF COURT REPORTERS

We certify that the foregoing is a true and
accurate transcription of our stenographic notes.

/s/ Norman B. Linnell
Norman B. Linnell, RPR, CM, VCE, FCRR

/s/ Anneliese J. Thomson
Anneliese J. Thomson, RDR, CRR